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No. 93-252

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

SANTIAGO SANDOVAL,

Petitioner,

vs.

GERADO ACEVEDO, Warden of East Moline Correctional Center,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Illinois Rape Shield Statute is unconstitutional *per se*, or in the alternative, whether the Illinois Rape Shield Statute was unconstitutionally applied to the Petitioner in this case in violation of the confrontation clause of the Sixth Amendment of the United States Constitution and in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Santiago Sandoval, Petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District was filed on January 13, 1989 and is reported at 178 Ill.App.3d 669, 533 N.E.2d 980, 127 Ill.Dec. 898 (1989). It is reproduced in the Appendix (App. 1-24, *infra*).

The opinion of the Supreme Court of Illinois was filed on January 17, 1990, and is reported at 142 Ill.Dec. 135, 552 N.E.2d 726 (1990). It is reproduced in the Appendix (App.25-86, *infra*).

The opinion of the United States District Court for the Northern District of Illinois was filed on March 31, 1992. It is reproduced in the Appendix. (App. 88-153, *infra*).

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on May 20, 1993. (App. 154-173, *infra*).

JURISDICTION

The judgment of the Appellate Court of Illinois, Second Judicial District, which reversed the judgment of the Circuit Court on two issues, and remanded

the case to the Circuit Court for a new trial, was entered on January 13, 1989. Thereafter, the People of the State of Illinois, were granted leave to appeal to the Honorable Supreme Court of Illinois. On January 17, 1990, the Illinois Supreme Court reversed the Honorable Appellate Court. A Petition for Rehearing was denied on April 9, 1990.

An order of this Honorable Court denying Petition for Writ of Certiorari was entered on October 29, 1990. It is reproduced in the Appendix (App.87).

The opinion of the United States District Court for the Northern District of Illinois was filed on March 31, 1992 denying habeas corpus.

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on May 20, 1993 affirming the denial of habeas corpus by the United States District Court for the Northern District of Illinois.

This Petition is being filed within 90 days of the May 20, 1993 opinion of the United States Court of Appeals for the Seventh Circuit Court. The jurisdiction of this Court is invoked under 28 U.S.C.§1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions,the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against in his favor...".

Those rights are incorporated in the Fourteenth Amendment to the Constitution of the United States which provides:

"No State shall make or enforce any law which shall abridge the privileges-...of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...".

Illinois Revised Statutes, (1987), Chapter 38, §115-7:

> "a. In prosecutions for aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse or criminal sexual abuse, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of

the alleged victim with the accused.

b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim and the defendant. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim and the defendant."

STATEMENT OF THE CASE

On January 7, 1987, the Lake County, Illinois grand jury by indictment charged Petitioner, Santiago Sandoval, with two counts of Aggravated Criminal Sexual Assault, two counts of Criminal Sexual Assault, and one count of Unlawful

Restraint. (R C13-19) A jury trial commenced on March 2, 1987, and concluded on March 5, 1987. Petitioner was convicted of two counts of Criminal Sexual Assault and Battery, as a lesser included offense, and found not guilty of Aggravated Criminal Sexual Assault and Unlawful Restraint. (R C126-131) Post-Trial Motions were denied and Defendant was sentenced to a term of fifteen years in the Department of Corrections for the offense of Criminal Sexual Assault. (R 835)

Of the three witnesses comprising the State's case-in-chief, the complaining witness, Pamela Schmid, testified that she was a 20-year old, divorced mother of a 2-year old child. She met the Petitioner in the summer of 1986; they dated for two months prior to living together for three months. Because of violent episodes that occurred when she refused sexual intercourse, she moved out, but she soon began seeing him again. (R 156-172)

They went out for New Year's Eve, 1986, but when an argument ensued wherein the Petitioner accused her of sleeping with another man, they drove to his

apartment to discuss their relationship. She said she tried to leave twice, but Petitioner stopped her. She said he was crying and irate and told her, "...that he was going to fuck me one last time." He pushed her to the floor, then dragged her to the bedroom by her hair. (R 176-201)

When he told her to roll over onto her stomach, she got on her knees, begging him not to have anal sex because it hurt very bad and she did not like it. She said she had had anal sex with him on two prior occasions. (R 205-206) When the Assistant State's Attorney asked her, "Had you ever had anal sex in the past?", she answered "With others?". The Assistant State's Attorney said, "Yes, with others." The witness then replied, "No." (R 207)

Ms. Schmid stated that while she cried, pleaded, and tried to stop him, Petitioner pulled her panties down below her knees. While lying on her stomach, he grabbed her "butt cheeks" and she slapped him. He then began to hit her, causing a bruising on her ear and a lump on the back of her head. (R 208-213) Petitioner told her he would make it

hurt, and then inserted his penis into her anus. (R 215-216) She then sucked his penis because she believed he had reached in his closet for a gun. Because she thought he still had something in his hand, the anal and oral acts were repeated. (R 217-224)

When she noticed he did not have anything in his hand, she escaped wearing only her bra, underwear and skirt, and pounded on the first apartment door she reached. She told the man who answered that she had been raped downstairs and they called the police. (R 225-228)

On Cross-Examination, the witness stated that she was receiving rape counselling and had not dated since the incident. When asked if she had been out with a man at "Annie's Bar" a week prior to testimony, she answered "I don't recall any Annie's Bar" and specifically denied being out on a date. (R 263-265) She denied telling police that she had met the Petitioner on New Year's Eve and that there had been a scene at that nightclub. (R 267-269)

She stated to Defense Counsel that she had previously had anal sex with Petitioner twice and that it was painful.

She said she had not had anal sex with any other person. When Defense Counsel asked, "Okay, Now you know what we're talking about when we say 'anal sex', the act that was described here this morning?", she answered "Yes". Defense Counsel then asked, "Okay, Now, you know a fellow named ---". A side-bar followed a State objection, based upon the Illinois Rape Shield Law [Ill.Rev.Stat. (1977), Ch. 38, 115-7]. (R 281) Defense Counsel stated he had an impeaching witness who would testify that he had anal sexual relations with Pamela Schmid. The Court indicated that that person need not be specifically named because of her denial of anal sex with anybody else "...since they have opened the door." The Court further stated, "Well, she has--she has indicated that she had done it twice only. You can bring another person in to impeach her about the anal sex, if that's the case." Counsel named the person and indicated he was in his office at that moment. (R 289-290) The State rested after calling the neighbor who testified as to opening the door to a distraught woman in a bra and long half-slip and calling the police, and the

responding police officer who testified to small bruises behind Ms. Schmid's right ear, her hand and left knee and to the execution of a search warrant whereby he recovered various items belonging to Ms. Schmid. (R 305-334)

After the denial of a Motion for a Directed Verdict, argument ensued regarding the rebuttal witness and the Illinois Rape Shield Law. As an offer of proof, the Defense informed the Court that the rebuttal witness would impeach Ms. Schmid's testimony in two respects: he would state he had anal intercourse with her, and that she initiated it and enjoyed it; and that he had seen her at 4 A.M. the previous Thursday at Annie's Bar hanging all over a man. (R 343-346 & 784) The Court ruled that the rebuttal witness could not be called for either impeachment purpose.

Counsel for the Defense called six witnesses, the first of which was the Petitioner, Santiago Sandoval. He testified that he was a 27-year old divorced father of a 2-year old son. He testified as to how he and Ms. Schmid met, and their sharing of an apartment with her son. (R 365-374)

While they talked of marriage, they had arguments, most of which were little, but some were big and, she became aggressive towards him. He said that they had anal sex "a dozen times", beginning three weeks after they met; she never expressed displeasure with it, sometimes initiating it herself. (R 375-396).

Because she was seeing another man, she moved out but called five days later, wanting to resume their relationship. They spoke of counselling to solve their arguments but he later changed his mind because he knew they both had tempers and after a big argument, "...we solved our problems in the bedroom." (R 398-400)

On New Year's Eve, the disc jockey at the nightclub told him she had been there with a man, and not the friends she had mentioned to him. When she admitted she lied, he told her he was leaving. She followed him and they drove to Waukegan without speaking. (R 401-419)

She followed him into his apartment, and sat beside him on the couch. She kept apologizing and moving closer to him, while he told her he wanted nothing more to do with her. She started to leave, apologized again, came back close

to him to hold him, and he slapped her with the back of his hand and told her to get away. Finally, she was crying and apologizing and, he hugged her. They started kissing and went to the bedroom where they started to make love. She began to give him oral sex and then guided his penis to her anus. After what had happened however he really wasn't in the mood for love-making, he rolled away and she got on top of him. These acts were not giving him any satisfaction. She turned around and began giving him oral sex again. He testified that she had performed oral sex after anal sex on two or three previous occasions. He told her their relationship wasn't working and he'd never be able to trust her. She kept denying having sex with another man, apologizing, and promising that it would not happen again. Finally, he said, "Just put your clothes on and get out of my house." After being told this two or three times, she got up, put on her slip and bra, still apologizing, saying, "It will never happen again." Now crying and upset, she said something like, "I'm going to -- I'm going to screw you", reached for something on the floor, and

stormed out. (R 417-443)

Petitioner denied threatening her and denied ever owning or having a gun in the apartment. (R 444)

Petitioner said he got up, opened the door, saw her going upstairs, and sarcastically said, "Goodbye". Back inside, he picked up her underwear and hose from the hallway and threw them in the closet. He dressed and went outside to look for her. Not finding her in the laundry rooms, he went into his apartment, then out to the parking lot and then back inside. (R 449-451) He then went out to his car to look for her.

When he saw a squad car, he got out of his car and walked to the building's front where Ms. Schmid stood with two officers. When she told the officers that he was the man, they told him he was under arrest. When he asked why, they told him "Sexual Assault". (R 252-254)

Two witnesses were called to testify to Petitioner being a peaceful and law abiding citizen, and another who testified they were having a good time prior to their going to the nightclub. (R 482-505)

A Defense Motion for a Mistrial based

upon the complaining witness' testimony that she never had anal intercourse with anyone but the Petitioner was denied. (R 511)

Two officers, called by the Defense, testified that some of Ms. Schmid's trial testimony was both contrary to, and not mentioned in, her prior statements. Both said that when they recovered her panties, there was no hole in them, as there was when entered into evidence. (R 523-562)

In rebuttal, two officers testified that Petitioner did not tell him that Ms. Schmid had told him, "I'll screw you". (R 565-584) Petitioner's ex-wife testified that his reputation for peacefulness was not very good. (R 597)

Just prior to closing arguments, the Judge stated to the jury, "I wish to advise and admonish you about the following: Testimony of Pamela Schmid that she had not had anal intercourse with anyone prior to having it with Santiago Sandoval was improper and is hereby stricken. You the jury is *(sic)* instructed to disregard that testimony and give it no weight whatsoever in your deliberations." (R 631/C 125)

As in his Petitions to the United States District Court for the Northern District of Illinois and to the United States Court of Appeals, Seventh District, in his Briefs to both the Appellate and Supreme Courts of Illinois, Petitioner raised the issues of his constitutional rights of confrontation and due process. (See App. 9 and 32)

REASONS FOR GRANTING THE WRIT

THE ILLINOIS RAPE SHIELD STATUTE IS UNCONSTITUTIONAL *PER SE*, OR IN THE ALTERNATIVE, THE ILLINOIS RAPE SHIELD STATUTE WAS UNCONSTITUTIONALLY APPLIED TO THE PETITIONER IN THIS CASE IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A) THE SCOPE OF CROSS-EXAMINATION OF THE ALLEGED VICTIM REGARDING PRIOR SEXUAL ACTIVITY WAS IMPROPERLY LIMITED IN VIOLATION OF THE

CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The alleged acts of forced sex in this case were alternating acts of oral and anal intercourse. The complaining witness testified that she pleaded strongly with the Petitioner not to have anal intercourse because she had had anal sex with him on two occasions in the past and it hurt very much. (R 206) Then the State's Attorney went on to question her as follows:

QUESTION: "Had you ever had anal sex in the past?"

ANSWER: "With others?"

QUESTION: "Yes, with other people?"

ANSWER: "No." (R 207)

Thereafter, on cross-examination, the following took place:

"DEFENSE: Q. Okay, Now, I guess it's in the nature of a situation like this to be a little indelicate, and for that I apologize, but you mentioned in your testimony that when you had anal sex that

it was painful, and -- but more to the point, that this was the third time? I remember you said that this had happened on two prior occasions?

WITNESS: A. Yes.

DEFENSE: Q. And that you told Ray you didn't like it because it was painful?

WITNESS: A. Yes.

DEFENSE: Q. Okay And that prior to this incident with Ray, you had not had anal sex before ever?

WITNESS: A. Yes.

DEFENSE: Q. Okay. Now, you know what we're talking about when we say "anal sex", the act that was described here in court this morning?

WITNESS: A. Yes.

DEFENSE: Q. Okay. Now you know fellow named ---"

A State objection was followed by a side-bar.

The State's Attorney stated that the objection was based upon the Rape Shield Law. (R 281) Defense Counsel stated that he had a witness sitting in the hallway who would impeach the complaining witness to the effect that he had anal sexual relations with her. (R 282) The Court indicated at this point that the

Public Defender need not specifically name that person in a question put to the complaining witness because she had denied having anal sex with anybody else "...since they have opened the door." (R 285) The Court further stated, "Well, she has -- she has indicated that she has done it twice only. You can bring another person in to impeach her about the anal sex, if that's the case." (R 290)

Defense Counsel then indicated to the Court, on the record, that the other person's name was Roosevelt Abron, 1614 Hartree, Evanston, Illinois. Counsel advised the Court that said person was in the Public Defender's Office at that very moment. (R 290)

Our Illinois "Rape Shield Law" in Sub-Section (a) reads as follows:

> "In prosecutions for aggravated criminal sexual assault, criminal sexual assault, aggravated sexual abuse or criminal sexual abuse, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused." Ill.Rev.Stat. 1985, Ch. 38, Par. 115-7a

Later on, during the course of the trial, the Court ruled that Defense Counsel would not be permitted to cross-examine the complaining witness regarding prior anal sex with a person other than Defendant, and Defense Counsel would not be permitted to put the other person on the stand to testify as to prior acts of anal sex with the complaining witness.

The Court indicated that his ruling was based on the aforesaid language contained in the Illinois "Rape Shield Law". Later, during the trial, Defense Counsel made a motion for a mistrial based upon the complaining witness' testimony that she never had anal intercourse with anyone other than Defendant. This motion was denied. (R 511)

For purposes of this argument, the pertinent provisions of the Sixth Amendment to the United States Constitution are as follows: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (U.S. Const., Amend. VI.) A similar provision appears in Article I,

Section 8 of the Illinois Constitution.

In *People v Campos,* 155 Ill.App.3d 348, 507 N.E.2d 1342, 108 Ill.Dec 1 (Ill.App. 2 Dist. 1987), the court said at page 7:

> "The sixth amendment confrontation clause ensures the defendant the right to cross-examine all adverse witnesses, a necessary right for a fair trial (citing cases). The essential aim of this confrontation provision is to ensure the integrity of the fact-finding process. The defendant correctly points out that he is entitled to present relevant evidence (citing cases) and to fully cross-examine to show bias, interest, or motive. (citing cases)..."

In *People v Ellison,* 123 Ill.App.3d 615, 463 N.E.2d 175, 79 Ill.Dec. 37 (Ill.App. 2 Dist. 1984), the Court said at page 45:

> "The State policy underlying the rape shield statute, at least ostensibly as expressed in *People v Cornes,* is to prevent the defendant from harassing and humiliating the prosecutrix at trial with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than the defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant. Further, exclusion of such evidence keeps the jury's attention focused only on issues relevant to

> the controversy at hand. Last, but not necessarily least, the exclusion promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their past sexual activity brought before the public."

In *People v Cornes*, 80 Ill.App.3d 166, 399 N.E.2d 1346, 35 Ill. Dec. 818 (1980), the Court said at page 825:

> "The exclusion of this evidence does not prevent defendant from challenging or attacking complainant's credibility or veracity or otherwise utilizing cross- examination as an effective tool of impeachment. It merely denied defendant the opportunity to harass and humiliate the complainant at trial and divert the attention of the jury to issues not relevant to the controversy. At the same time, it provides an effective law enforcement tool by encouraging victims of rapes and other sexual assaults to report these crimes to the proper authorities without fear of having the intimate details of their past sexual activity brought before the public."

However, there are times when the State's policy in protecting a certain class of individuals must give way to a superior Constitutional consideration. For instance, in the State of Alaska

there is a statutory provision to protect anonymity of juvenile offenders. In *Davis v Alaska*, 415 U.S 308, 39 L.Ed 2d 347, 94 S.Ct. 1105 (1974), the prosecution, pursuant to this statute moved for a protective order to prevent any reference, in the course of cross-examination, to the juvenile record of a crucial prosecution witness. The defense indicated that it would seek to show that since the witness was on probation by order of a juvenile court, he may be subject to undue pressure from the police. The trial court granted the prosecution's motion. On *certiorari*, this Honorable Court reversed and remanded.

Chief Justice Burger wrote:

> "We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. (Citing cases) Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case

> would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record--if the prosecution insisted on using him to make its case--is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness."

In *U. S. ex rel. Fuller v Attorney General of Illinois*, 589 F.Supp. 206 (1984), the Court, in commenting on a state court's refusal to allow an Illinois defendant, who put in evidence the prior sexual conduct or reputation of a complainant, stated as follows:

> "The reviewing court must decide, looking to the record as a whole and to the alternative means open to the defendant to impeach the witness, whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony.' (Citing Cases.) In making its determination, we must decide whether the probative value of the excluded evidence "was such that the defendant's right to

> effective cross-examination was substantially diminished.'" (Citing cases.) pp. 209-210

The Court in *Fuller,* said that several federal courts, using the aforesaid standards, have upheld the application of rape shield statutes in the state courts and the one found in Federal Rule of Evidence 412. The Court went on to say:

> "These courts nevertheless recognize that in some circumstances prior sexual conduct may be probative and therefore relevant and should be admitted, for instance (1) where the evidence explains a physical fact in evidence at trial, such as presence of semen, pregnancy, or the victim's physical condition indicating intercourse; (2) where the evidence tends to establish bias, prejudice or ulterior motive surrounding the rape charge; or (3) where the victim has engaged in a prior pattern of behavior clearly similar to the conduct involved in the present case..." (emphasis added.)

Because the defendant in that case did not offer the excluded evidence for any of the aforesaid purposes, his writ of habeas corpus was denied.

In *Shockley v State,* 585 S.W.2d 645 (1978), the Court of Criminal Appeals of

Tennessee held that the trial court judge erred in not permitting the defendant to cross-examine complaining witness or call witnesses in his behalf for the purpose of proving her consensual sexual activity during the period in which conception might have occurred. Defendant had been denied the opportunity to ask the complaining witness whether the acts for which he was being charged, the intercourse causing her pregnancy, could have been committed by another person. In addition, he was prevented from calling witnesses who would have testified that they could have been responsible for the act of intercourse which caused her pregnancy. The court made clear that it was not declaring the Tennessee "Rape Shield" statute unconstitutional. At page 651, the court said:

> "Rather we are recognizing that the statute is not controlling in this particular case and that its application must be construed in light of the appellant's due process rights. That the statute was not so construed in the trial of this case constitutes reversible error."

In *State v Jalo,* Or.App., 557 P.2d 1359 (1976), the Court of Appeals of Oregon,

relying on *Davis v Alaska, in banc* held that the Oregon "rape shield" statute had to give way to defendant's right to show that he had discovered the complainant's prior sexual promiscuity, therefore, giving her a motive to falsely accuse the defendant of a sex offense. The court said, "The only difference between *Davis* and this case is that the policy of (the Oregon rape shield statute) is to protect a sex-crime complainant. On the facts at bar, however, this policy must likewise be subordinated to the defendant's constitutional right to confrontation." (at page 1362.)

In *State v LaClair,* 433 A2d 1326 (1981), the Supreme Court of New Hampshire held that the protection from undue harassment afforded to a prosecutrix by the New Hampshire rape shield law must yield to the defendant's right to confront the evidence against him. The Court stated that the sexual activities of a prosecutrix immediately prior to an alleged rape may be a relevant area for cross-examination. "This is especially true where, as here, the evidence of prior sexual activities might explain physical inju-

ries of the prosecutrix." (Citing cases.) In reversing the case, the court held that, "Evidence of the prosecutrix's inconsistent statements regarding her virginity and evidence of her prior sexual activity as it might explain the presence of sperm in her vagina, is admissible at the new trial." (at page 1330.)

In *Walder v United States,* 347 U.S. 62, 98 L.Ed. 503, 74 S.Ct. 34 (1954), evidence of defendant's possession of narcotics had been suppressed because it was illegally obtained in violation of defendant's constitutional rights. However, the defendant in his direct testimony stated that he never sold, possessed, or had anything to do with narcotics. The trial court permitted the prosecutor to introduce into evidence the fact that defendant had been found in possession of narcotics. At L.Ed. page 506, this Honorable Court in upholding the trial court ruling said, "The sole issue here is whether the Defendant's assertion on direct examination that he never possessed any narcotics, opened the door."

In *Harris v New York,* 401 U.S. 222, 28

L.Ed. 2d 1, 91 S.Ct. 163 (1971), defendant's confession had been suppressed due to a *Miranda* violation. Defendant then took the stand and testified opposite to his confession. The trial court permitted the State to introduce his confession in rebuttal. This Honorable Court upheld the use of defendant's confession for this purpose. At page 5 of the opinion Chief Justice Burger wrote, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances."

In the case at bar, the complaining witness's testimony was the only evidence against the Petitioner. If her testimony were not believed by the jury, then the Prosecution's case would have surely failed. Therefore, it was critically important that the Petitioner be permitted the widest latitude in cross-examining her. While the purpose of the "Rape Shield" statute may be laudable, nevertheless, there are some cases when these purposes must be subordinated to a defendant's superior right to confront the witnesses against him. This is such

a case.

The complaining witness testified that anal sexual intercourse was extremely painful to her on two previous occasions and that as a result of this occasion, she was unable to sit the next day. There was absolutely no medical or other testimony corroborating her statements to this effect. Certainly, cross-examination and subsequent rebuttal testimony to the effect that she, in fact, had anal sexual intercourse with another person, and not only did not complain, but that she initiated it, and enjoyed it, would have been devastating to the State's case.

Whether the jury would have believed such other witness is immaterial. The Petitioner had a right to place this testimony before the jury for its consideration.

Her denial of prior anal sexual intercourse was not brought out by the Defense, but was in fact, brought out by the Prosecution in the direct examination of Ms. Schmid. Therefore, the Prosecution violated the Rape Shield statute in order to elicit testimony to support its case, and yet, this very statute was used

to bar Petitioner from devastating impeachment on cross-examination and in rebuttal testimony.

While a curative instruction was given and may well have been sought by the Petitioner, it was only after the trial court made its ruling barring the cross-examination and rebuttal testimony, and after the court had refused to declare a mistrial later in the proceedings. Such a curative instruction was no substitute for permitting the Defense's desired cross-examination and rebuttal testimony. *Bruton v U.S.*, 391 U.S. 123, 20 L.Ed. 476, 88 S.Ct. 1620 (1968).

In a more recent United States Supreme Court decision regarding issues similar to issues presented in this appeal, the Court ruled that the Defendant was unreasonably limited in the cross-examination of the complaining witness regarding her cohabitation with another man. In *Olden v Kentucky*, 488 U.S. 227, 102 L.Ed 2d 513, 109 S.Ct. 480 (1988), the Court said, "The Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the witnesses against him.' That right, incorporat-

ed in the Fourteenth Amendment and therefore available in state proceedings, *Pointer v Texas,* 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965), includes the right to conduct reasonable cross-examination. *Davis v Alaska,* 415 U.S. 308, 315-316, 39 L.Ed. 2d 347, 94 S.Ct. 1105 (1974)."

The Honorable Appellate Court for the Illinois Second District properly concluded that alleged rape victims may choose to forego and waive the benefits conferred upon them by the Rape Shield Statute. (App. 11) The Illinois Appellate Court correctly analyzed the trial as being one where "...there was so little corroborating evidence, (that) the jury's verdict depended almost exclusively on who it found to be the most believable... ." (App. 12) Therefore, her statement that she had never had anal sex, other than with the Petitioner, was the proper subject of exploration on cross-examination and rebuttal evidence which was available to the Defense. Credibility was crucial and Petitioner was prejudiced when precluded from impeaching the only other eye-witness to the occurrence about her past activity.

(App. 14-15)

While the Honorable Appellate Court decided the issues on the basis of statutory interpretation rather than on Constitutional grounds, Petitioner urges this Honorable Supreme Court to decide this case on United States Constitutional grounds of right to confrontation.

A very scholarly discussion of the Rape Shield Statutes in the United States is contained in the University of Minnesota Law School's, *Minnesota Law Review*, Vol. 70, No. 4 beginning on Page 763.

B) THE SCOPE OF CROSS-EXAMINATION OF THE ALLEGED VICTIM RELATING TO HER ACTIVITIES WITH A MALE PERSON IN A MUNDELEIN BAR JUST DAYS BEFORE THE TRIAL WAS IMPROPERLY LIMITED IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

On cross-examination, the complaining witness stated that she was receiving counselling from the Lake County Crisis Center and LaCasa, which is a place for rape victims. She said that the counselling had changed her relationships with men to the extent that she had not dated men since the alleged sexual assault by Petitioner. She was then asked whether or not she had been out with a man on February 27 (being the week before her testimony in this case), at Annie's Bar in Mundelein at around four (4) o'clock in the morning. She answered, "I don't recall any Annie's Bar." She specifically denied being out on a date.

Defense Counsel, in an offer of proof, said that a witness available to the Defense, by the name of Roosevelt Abron, would testify that Ms. Schmid was seen by him in a bar known as "Annie's" in Mundelein, Illinois just the Thursday before the trial, at four (4) o'clock in the morning. She was hanging all over a gentleman friend of hers at the bar. (R 343-346)

The Court ruled that this evidence was inadmissible and did not let the Defense put Mr. Abron on to testify to

that incident.

As a result of this ruling, the Petitioner was once again denied an opportunity to severely impeach the only witness against him. Again, this case involved a credibility contest between the Petitioner and the complaining witness. Again, Petitioner should have been permitted the widest latitude in cross-examining the complaining witness and in impeaching her with a rebuttal testimony.

The basis for the Court's ruling is not clear from the record. If the Court relied on the Rape Shield Statute for this ruling, such reliance would be misplaced because the statute refers only to prior sexual activity. Therefore, the ruling must have been based on relevance, and we respectfully submit that such basis was erroneous. When the star witness for the Prosecution testifies one way, in a strong and unequivocal manner, and proof is available to the Defense to the contrary, such contrary proof would be relevant and material with respect to the witness's credibility.

The issue is very similar to the one presented in *Olden v Kentucky*, 488 U.S. 227,

102 L.Ed. 2d 513, 109 S.Ct. 480 (1988). The Court there concluded that defendant was severely prejudiced when limited in the cross-examination of the complaining witness regarding her cohabitation with another man, and this United States Supreme Court stated, "The Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the witnesses against him.' That right, incorporated in the Fourteenth Amendment and therefore available in state proceedings, *Pointer v Texas,* 380 U.S. 400, 13 L.Ed 2d 923, 85 S.Ct. 1065 (1965), includes the right to conduct reasonable cross-examination. *Davis v Alaska,* 415 U. S. 308, 315-316, 39 L.Ed. 2d 347, 94 S.Ct. 1105 (1974)."

The Illinois Appellate Court recognized the similarity between this issue and the previous one, and ruled that the Petitioner should have been permitted to present evidence relative to complainant's activity with the man in Annie's Bar in Mundelein.

CONCLUSION

Wherefore, the Petitioner, SANTIAGO SANDOVAL, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the
Appellate Court of Illinois
Second Judicial District
No. 2-87-0309 --
Filed January 13, 1989

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

SANTIAGO SANDOVAL,

Defendant-Appellant.

JUSTICE NASH delivered the opinion of the court:

After trial by jury, defendant, Santiago Sandoval, was found guilty of two counts of criminal sexual assault (penis in anus, penis in mouth) (Ill.Rev.Stat. 1985), ch. 38, par. 12-13 (a) (1)) and battery (Ill.Rev.Stat. 1985, ch. 38, par. 12-3) as a lesser-included offense; he was found not guilty by the jury of aggravated criminal sexual assault(Ill.Rev.Stat.-1985, ch. 38, par. 12-149A) (2)) and unlawful restraint (Ill.Rev.Stat. 1985, ch. 38, par. 10-3(a)). Defendant was sentenced to 15 years' imprisonment and he appeals,

contending: (1) he was not proved guilty beyond a reasonable doubt; (2) erroneous and prejudicial evidentiary rulings in trial require reversal; (3) the verdicts of the jury were logically and legally inconsistent; and (4) the sentence was excessive as defendant had no prior criminal record except for minor traffic offenses.

The evidence at trial disclosed that the complainant and defendant met during the summer of 1986 and lived together in a Waukegan apartment for about three months, together with complainant's two-year-old son from a former marriage. The complainant testified defendant would become violent if she refused to have sexual relations with him and that on several occasions he inflicted physical abuse on her. She and her child eventually moved out in October 1986.

Subsequently, she started to see defendant again and for two months everything was fine. On New Year's Eve, the couple went out for the evening, first to see his sister-in-law in a Waukegan hospital, who had had a baby; defendant's family was there too. They then went to a friend's home in Waukegan

to a party and left there at 10:30 p.m. to go to Cagney's that she had recently been out with a man named Tony, but had lied to defendant about it. He accused her of sleeping with Tony, which she denied. Defendant calmed down after a while, and they shared a bottle of champagne before leaving the bar to drive to defendant's apartment.

The complainant further testified that in his apartment they sat on the couch together and defendant again accused her of having sexual relations with the other man. As he became angry, she started to leave and he took her arm and told her to sit down on the couch. Complainant stated she was scared as defendant became increasingly angry and emotional. He said he was going to have sex with her one last time and pushed her to the floor, getting on top of her. He then pushed her into the bedroom and, as she suspected defendant sought anal sex, the complainant begged him not to do it that way because she had told him before that it hurt and she didn't like it that way. She testified that she had had anal sex with defendant on two prior occasions and, in response to a question by the

assistant State's Attorney, stated she had never had anal sex with any other person.

According to the complainant, a struggle followed on the bed in which defendant hit her repeatedly on the back of her head, causing a bruise on her ear and a lump on her head. He penetrated her anus with his penis and thereafter told her to perform oral sex upon him. She refused, but acquiesced when he reached into a closet and she believed defendant might have a gun. This was followed by another sequence of anal and then oral sex. The next day she could not sit.

When the complainant noticed defendant had nothing in his hand, she got up from the bed upon which they were lying and ran out the apartment door to the floor above where she pounded on an apartment door. She told the man who answered that she had been raped and asked to use the telephone; complainant called the police and said she had been raped.

In his testimony at trial, defendant's version of the events that night was substantially different than was the

complainant's. He stated they had had anal sex a dozen times prior to the incident in question and that she had never expressed displeasure and sometimes initiated it. On New Year's Eve, after hey arrived at his apartment, the complainant started apologizing for seeing another man. He told her that he wanted nothing more to do with her, but she became aggressive sexually and he slapped her with the back of his hand to keep her away. Eventually, they left the couch and went into the bedroom and disrobed and the complainant initiated sexual activity, including anal and oral sex. Defendant testified he was not receiving any satisfaction and he told her their relationship was over and he couldn't trust her. When defendant directed her to dress and leave his apartment, she threatened him and stormed out. Defendant denied threatening complainant in any way and stated he had never owned a gun or had one in his apartment.

In addition to the testimony of these parties at trial, evidence was offered to impeach both defendant and complainant, character evidence relating to defendant was admitted, as was some

physical evidence.

We note initially that defendant has waived consideration of the reasonable doubt and inconsistent verdict issues for failure to comply with Supreme Court Rule 341(e) (7) (107 Ill.2d R. 341(e) (7).) That rule requires, *inter alia,* that argument in an appellant's brief shall contain his contentions and the reasons therefor, with citation of the authorities relied on. It provides further that points not argued are waived. (107 Ill.2d R. 341(d) (7).) While defendant does argue facts he considers relate to the reasonable doubt question, he offers no supporting authority. Defendant's argument directed to the inconsistent verdict issue consists of the statement, that, "If defendant was not guilty of Unlawful Restraint, he logically could not be guilty of Criminal Sexual Assault." He offers no citation of authority in support of this argument. We decline to research these issues for defendant and his counsel and will not address them. *People v Ramirez* (1983), 98 Ill.2d 439, 472, 75 Ill.Dec. 241, 457 N.E.2d 31; *People v Deacon* (1985), 130 Ill.App.3d 280, 294, 85

Ill.Dec. 549, 473 N.E.2d 1854.

We consider first defendant's contention that the trial court erred by improperly limiting cross-examination of the complainant relating to her testimony as to her prior sexual activity with other persons.

During direct examination of her by the assistant State's Attorney, the complainant testified, in response to his questions, that she had never had anal sex with anyone else prior to her relationship with defendant. On cross-examination, when defendant's counsel sought to lay a foundation for impeachment on this issue, the judge noted that further foundation was not necessary since the witness had already testified she had not had anal sex with anyone else. The State objected to such inquiry on the grounds that the rape shield statute (Ill.Rev.Stat. 1985, ch. 38, par. 115-7(a)) barred inquiry as to the prior sexual activity of the complainant with others. The judge stated that as the door had been opened, the defense could bring in another witness to impeach the complainant about the anal sex.

Subsequently, however, at the

commencement of defendant's case, the trial court reconsidered its prior ruling. Defendant's counsel made an offer of proof that Roosevelt Abron would testify in impeachment of the complainant that he had anal sexual relations with her, that she initiated it and enjoyed it. The trial court ruled that the offered testimony was precluded from evidence by the rape shield statute. When instructing the jury, the court admonished it to disregard complainant's testimony she had not had anal intercourse with anyone other than defendant, stating that the testimony was improper and was stricken.

Defendant argues that the refusal to permit him to challenge the complainant's testimony denied his constitutional right to confront and cross-examine the witnesses against him and requires a new trial. The rape shield statute states in pertinent part:

> "In prosecutions for ***criminal sexual assault, *** the prior sexual activity for the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim <u>with the ac-</u>

cused." (Emphasis added.) (Ill.Rev.Stat. 1985, ch. 38, par 115-7(a).)

The State argues that this language is absolute and does not allow for admission of evidence that complainant had anal sex with a third party. While neither the parties' nor our research has disclosed an Illinois case directly on point, we do not interpret the statute to be so broad in scope as is urged by the State. Although the statute on its face does not establish any exceptions to the rule it creates, examination of the factors which prompted the rule leads to the conclusion that it does not preclude an exception for admission of the impeaching evidence offered by defendant in this case.

The policy underlying the rape shield statute is to prevent the defendant from using evidence of the complainant's past sexual activity with third persons to harass and humiliate her and shift the jury's attention to irrelevant issues. The statute also aids law enforcement by encouraging victims to report criminal sexual assaults without fear of exposure of the details of their past sexual activity. (*People v Ellison* (1984), 123

Ill.App.3d 615, 626, 79 Ill.Dec. 37, 463 N.E.2d 175; *People v. Cornes* (1980), 80 Ill.App.3d 166, 175-76, 35 Ill.Dec. 818, 399 N.E.2d 1346.) According to the *Cornes'* court:

> "The legislature was acting well within its power in enacting reasonable legislation intended to eliminate the cruel and abusive treatment of the victim at trial by precluding the admission of prejudicial and irrelevant material and to promote the lawful administration of the criminal justice system." (*Cornes,* 80 Ill.App.3d at 175-76, 35 Ill.Dec. 181, 399 N.E.2d 1346.)

There is no doubt that the statute was meant to protect the alleged victim in sexual assault cases. Nor is there a question that, because of the statute, an alleged victim's sexual history cannot be used against her when that history is not relevant. In the present case, however, the victim, by her own action at trial, rendered her past sexual activities relevant and thus admissible.

[1] We note initially that thee is nothing in either the language of the rape shield statute or the policies which

gave rise to it which expressly precludes a victim from introducing evidence regarding her own past sexual activities with third parties, or the lack of any such activities. Since the statute was enacted for the benefit of the rape victims, we conclude that such victims may choose to forego that benefit and offer evidence which would otherwise be prohibited by the statute. Consequently, complainant in this case was not restricted by the statute from asserting that she had not had anal sex with any partners other than defendant. But *cf., People v Sales* (1986), 151 Ill.App. 3d 226, 231, 104 Ill.Dec. 561, 502 N.E.2d 1221.

The nature of the evidence in this case must be examined in order to understand the significance of the testimony defendant sought to impeach. Complainant and defendant were the only direct witnesses to the alleged sexual assault, and their conflicting accounts of the incident constituted the primary evidence presented at trial. While testimony was given that complainant made a prompt complaint of rape to a neighbor of defendant, the record contains little other corroboration of her testimony. No

medical evidence was presented relating to any bodily injury of complainant, despite her testimony that she could not sit the next day and that she suffered from swelling and bruising on and about her head. The photograph of the bruises allegedly inflicted upon her ear reveals, at best, only slight discoloration, not inconsistent with defendant's admission that he back-handed her. Nothing was offered to support complainant's testimony that her panties were torn when defendant pulled them down. None of the police officers noticed the tear when the panties were collected as evidence. Although one of her earrings was found on the floor, broken, complainant did not know when it had fallen from her ear or how it had been broken. Neither a gun nor any evidence of a gun was found in defendant's apartment. No neighbors testified that they heard yelling or sounds of a struggle. In sum, the State's case stood on complainant's essentially unsubstantiated testimony.

[2] Since there was so little corroborating evidence, the jury's verdict depended almost exclusively on who it found to be the most believable of complainant and

defendant. It was in this context that complainant asserted she had never had anal sex prior to having it with defendant. This claim was obviously intended to underscore her testimony that on the occasion in question she feared anal sex because it had caused her a great deal of pain in the past and that, although she pleaded with defendant not to do it that way, he penetrated her anus by use of force, as charged in the indictment. Stated another way, complainant made a statement regarding her sexual history in order to bolster her own credibility in the eyes of the jury. In a case that turned on the credibility of the parties, it seems appropriate that defendant be given the opportunity to challenge complainant's testimony. In this sense, the refused evidence which might have impeached complainant's testimony became highly relevant. The rape shield statute, as noted earlier, prohibits evidence of past sexual conduct <u>when such conduct is irrelevant to the issues</u>. Since defendant's proffered evidence was very relevant to the issue of complainant's credibility, its admission was not here prohibited by the statute.

To interpret the statute otherwise would encourage witnesses in these circumstances to testify without regard for the truth, secure in the knowledge that they were insulated by the rape shield statute from confrontation with any untruths they may choose to express. A shield such as this was never meant to be created by the statute. It is precisely this result which is avoided by the language in *Cornes* and *Ellison* that the evidence to be barred by the statute is that which is not relevant to the case before the court, but is introduced anyway for the sole purpose of humiliating the victim. Where the evidence is relevant and is introduced, not to harass the witness but only in a defensive response to the alleged victim's own initiative, the statute does not preclude an exception to the general protective umbrella it places over victims of sexual assault. Once a complainant decides to address her own past sexual conduct, or lack of it, she relinquishes the statutory protection and risks a challenge to the truthfulness of her version of that conduct.

Since credibility of the witnesses

was the crucial issue in the case, defendant was severely prejudiced when he was precluded from impeaching complainant's testimony about her past activity. Complainant's claim stood intact before the jury and was undoubtedly persuasive that she was also telling the truth about the alleged assault on her by defendant. Had defendant been able to introduce his impeaching evidence regarding complainant's past, the State's case might have been seriously impaired. As it was, however, it was defendant's defense that was erroneously impaired, and he must be given a new trial.

The error was not corrected by the oral instruction to the jury to disregard complainant's statement. Complainant had already been heard and her testimony already had its bolstering effect. Prior to the instruction, the jury was given the impression that, at the time in question, the victim found anal sex painful and an act to be feared because she had only done it twice before with defendant and because she had never done it with anyone else. Merely telling the jurors to not consider complainant's testimony relating to her lack of such

conduct with others would not have significantly altered that impression.

Defendant has urged us to consider this matter on constitutional grounds. However, constitutional questions will not be decided by a reviewing court if the matter can be disposed of on other grounds. (*People v Fleming* (1971), 50 Ill.2d 141, 144, 277 N.E.2d 872; *People v Davis* (1977). 50 Ill.App.3d 163, 167, 8 Ill.Dec. 749, 365 N.E.2d 1135.) Since the case before us has been resolved through statutory construction, we need not address the constitutional issue. See, however, *Olden v Kentucky*, _____U.S._____, 109 S.Ct. 480, 102 L.Ed2d 513 (1988).

[3] An issue similar to the first is raised by defendant regarding testimony elicited from complainant on cross-examination as to the effect on her life of the incident with defendant. When asked if it had changed her relationship with men, complainant responded that she had not dated anyone since the occurrence. She was then questioned by defendant's counsel about being in a specific location at a time certain in the company of a date. She again respond-

ed that she had not been on a date. Defense counsel later attempted to impeach this testimony with a rebuttal witness who would have testified that he saw complainant, just a few days before the trial began, "hanging all over a gentleman friend of hers" at a bar. The trial court refused to admit this evidence and defendant argues that he was once again improperly denied the right to confront the complainant. The State responds that the evidence was collateral and irrelevant and correctly excluded. In our view, the defendant should have been allowed to impeach complainant as to this matter.

As discussed earlier, this case came down to an evaluation by the jury of the credibility of complainant and defendant. Complainant testified that defendant's assault had a great effect on her in that she had not dated at all since that night. If the jury believed this testimony, it was likely to believe that the reason she had not dated was because she had sex forced upon her by defendant. Thus, any proof that complainant was not honest about the aftermath of the alleged assault would have been relevant to the

believability of her accusations against defendant and should have been admitted. Exclusion of defendant's impeaching evidence on this issue compounded the prejudice he suffered from the exclusion of evidence under the rape shield statute as described earlier.

Although we consider the issue to have been waived, defendant has argued that he was not proved guilty beyond a reasonable doubt. Mindful of the directive in *People v Taylor* (1979). 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E. 2d 366, we have examined the evidence introduced against defendant and find that, if believed by the jury, it was sufficient to show beyond a reasonable doubt that he was guilty of criminal sexual assault as charged, as well as the lesser-included offense of battery. Our finding raises no inference as to defendant's guilt or innocence which would be binding on retrial, but is meant only to protect him from the risk of being subjected to double jeopardy.

Because of the errors made at trial we reverse defendant's convictions and remand for a new trial. We need not consider the issues he raises as to the

sentence imposed.

REVERSED AND REMANDED FOR A NEW TRIAL.

WOODWARD, J., concurs.

Justice REINHARD, dissenting:

I respectfully dissent. During the direct examination of the complaining witness by the assistant State's Attorney, the complainant testified, in response to the prosecutor's question, that she had never had anal sex with anyone else prior to their relationship with defendant. The plain language of the rape shield statute clearly prohibits the admission of any evidence regarding a victim's prior sexual activity other than with defendant. (Ill.Rev.Stat. 1985, ch. 38, par. 115-7(a).) This language has been interpreted to bar admission of a victim's lack of sexual activity with anyone other than the defendant when offered by the State. (*People v. Sales* (1987), 151 Ill.App.3d 226, 231, 104 Ill.Dec. 561, 502 N.E.2d 1221.) Such an interpretation is consistent with the purpose of the statute, which is to prevent evidence of a victim's prior sexual activity, other than with defendant, from being introduced into a case.

Thus, such evidence was incompetent and it was improper in this case for the State to introduce complainant's testimony that she had not had anal intercourse with anyone other than the defendant.

Nevertheless, defendant failed to object and, instead, attempted to attack this testimony by cross-examination of the complaining witness and by the introduction of a witness who would testify that he had anal sex with the complainant. While defendant was barred by the trial judge from offering such evidence on the basis of the rape shield law, the court later did instruct the jury to disregard complainant's testimony that she had not had anal intercourse with anyone other than defendant and to give it no weight. The court further stated that the testimony was improper and was stricken. Under these circumstances, I would find that the specific instructions to the jury by the court to disregard this evidence was within its discretion and avoided prejudicial harm.

It has been stated by our Supreme Court in *People v Newman* (1913), 261 Ill. 11, 103 N.E. 589, that "[t]he proper defense against incompetent evidence is an

objection, and its introduction without objection does not make evidence competent to contradict it. Parties cannot, by mere silence or consent, create a right to try an immaterial issue when they might have had the adverse evidence kept out or stricken out." (216 Ill. at 15, 103 N.E. at 591.) The appellate court in more recent decisions, however, has adopted the rule of "curative admissibility" whereby an opponent may reply with similar evidence if, in the discretion of the trial judge, it is needed to eradicate an unfair prejudice which might ensue from the original evidence. *People v Higgins* (1979), 71 Ill.App.3d 912, 930-31, 28 Ill.Dec. 173, 390 N.E.2d 340.

McCormick on Evidence § 57, at 133 (Cleary 2d ed. 1972) explains this rule:

> "if again the first incompetent evidence is relevant, or though irrelevant is prejudice-arousing, but the adversary has failed to object or to move to strike out, where such an objection might apparently have avoided the harm, then the allowance of answering evidence should rest in the judge's discretion. He should weigh the probable influence of the first evidence, the time and distrac-

> tion incident to answering it, and the possibility and effectiveness of an instruction to the jury to disregard it. However, here various courts have indicated that introduction of the answering evidence is a matter of right."

Under the "curative admissibility" principle, defendant's evidence to rebut the State's incompetent evidence was properly barred by the trial court. The trial court instructed the jury to disregard the complainant's testimony on this point. I do not agree with the majority that the jurors would be unlikely to heed the court's specific instructions. Furthermore, the single question the prosecutor asked the complainant on this subject was not repeated nor is the answer, later stricken, sufficiently prejudicial to allow the defendant to rebut this incompetent evidence. The trial court did not abuse its discretion in proceeding in the manner it did.

I also disagree with the majority's decision that, following testimony elicited from the complainant on cross-examination as to the effect on her life of the incident with defendant, the trial court erred in not allowing defendant to

impeach complainant as to this matter. A cross-examiner may not impeach a witness on a collateral matter and must accept the witness' answer. (*People v Collins* (1985), 106 Ill 2d 237, 269, 87 Ill.Dec. 910, 478 N.E. 2d 267.) The majority reasons that because complainant's credibility is at issue any impeachment of complainant as to the impact of the incident on her life would affect her credibility and, therefore, such inquiry is a noncollateral matter. Such an analysis would be true, however, whenever a party attempts to impeach a witness and would render all such inquiries noncollateral. The test to be applied in determining if a matter is collateral is whether the matter could be introduced for any purpose other than to contradict. (*Collins*, 106 Ill.2d at 269, 87 Ill.Dec. at 924, 478 N.E. 2d at 281.) Because the issue here is whether complainant was forced to have anal and oral sex with defendant against her will, the question to the complainant on cross-examination by defendant as to the incident's effect on her life is an inquiry which has no purpose in this case other than to contradict. As the application of the

"collateral" test is best left largely in the control of the trial judge, subject to his abuse of discretion (*Collins,* 106 Ill. 2d at 269-70, 87 Ill.Dec. at 924, 478 N.E. 2d at 281), I would find that the trial court's ruling refusing to allow impeachment on this collateral matter was not an abuse of discretion.

For the foregoing reasons, I dissent and would affirm the defendant's conviction.

Opinion of the
Supreme Court of Illinois
No. 682286. -- Filed Jan. 17, 1990
Rehearing Denied April 9, 1990.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,
v.
SANTIAGO SANDOVAL,
Appellee.

Justice CLARK delivered the opinion of the court:

At issue in this case is the admissibility of certain evidence about the sexual history of the complainant under the State's rape shield statute (Ill.Rev.Stat. 1987, ch 38, par.115-7). Santiago Sandoval, appellee, was found guilty on two counts of criminal sexual assault (Ill.Rev.Stat. 1985), ch. 38, par. 12-13(a) (1)) and one count of battery (Ill.Rev.Stat. 1985, ch 38,, par.12-14(a) (2)) and unlawful restraint (Ill.Rev.Stat. 1985, ch. 38, par. 10-3(a)) following a trial by jury in the Lake County Circuit Court. On appeal,

the convictions were reversed and the cause was remanded for a new trial. (178 Ill.app. 3d 669, 127 Ill.Dec. 898, 533 N.E. 2d 980.) This court granted the State's petition for leave to appeal pursuant to our Rule 315(a). Two questions are presented for review: (1) Is evidence of a victim's sexual relations with men other than defendant strictly precluded under the rape shield statute or may a victim waive the rule of evidence, thus allowing the evidence of prior sexual conduct? (2) Is evidence that a victim has not dated since the alleged attack properly excluded as collateral? For the reasons stated below, we reverse.

The incident which led to the indictment euphemistically referred to as "date rape" occurred on January 1, 1987. Sandoval had a date on New Year's Eve with his 20-year-old former live-in girlfriend; following a separation begun when the complainant moved out of the apartment she shared with Sandoval, the two had begun seeing one another again and had plans to celebrate the new year together. Although Sandoval's and complainant's accounts of how the evening

ended differed substantially, both indicate that repeated acts of anal intercourse followed by oral sex occurred. We will detail the events of the evening only as they are relevant for our analysis.

Sandoval testified that the events of New Year's Eve merely represented the same pattern which had occurred throughout his prior tempestuous relationship with the complainant: a fight was followed by making love. Sandoval further testified that an argument began when, during their evening out, he learned from an acquaintance that the complainant allegedly had an affair with another man during their on-again/off-again separation. Although the evening seemed to be following the same old pattern of fighting followed by sex, he stopped the lovemaking (which he testified had been mutual and consensual to that point) because he could not continue, knowing that complainant had an affair during their separation. He ended the sexual encounter and told complainant to leave his house. Sandoval acknowledged that they had anal sex, a practice which was initiated by complainant on this occa-

sion, followed by oral sex, which he also asserts was initiated by his partner. Sandoval argues that the present charges stem from the complainant's anger at being rejected after she had initiated sex between them; indeed, he testified at trial that as complainant left the apartment, she threatened him. Shortly thereafter, the police knocked at his door.

The complainant's testimony depicted a somewhat different conclusion to the evening. Complainant testified that Sandoval had become angry when he learned that she had been out with another man a week earlier. Rather than be left stranded at the bar in Wisconsin where they were when Sandoval learned about the evening out, complainant got into Sandoval's car as he was leaving. Sandoval then drove directly to his apartment. Leaving her coat in the car, the complainant followed Sandoval into the apartment where she attempted to talk with him about their relationship. She testified that he continued to get more upset and angry. She tried to leave, but Sandoval grabbed her arm; he told her, according to her testimony, that he was

going to have sex with her one last time. After a physical confrontation in the living room, Sandoval pushed complainant into the bedroom, where he hit her several times on the back of the head, told her he was going to make it hurt, and forced her into repeated acts of anal intercourse followed by oral sex. Complainant testified that she begged Sandoval not to engage in anal sex with her; although she testified that they had had anal sex on two prior occasions, she indicated that she had told Sandoval that she did not enjoy it and that it hurt. Finally when complainant thought that she could escape without being caught, the complainant ran out of the apartment to an upstairs apartment where the resident allowed her to call the police. When she knocked on the neighbor's door she was wearing only undergarments and a skirt. She left behind her purse, her sweater, and some jewelry.

During the complainant's direct examination at trial, the following exchange occurred between the State's Attorney and the complainant:

"Q. Now, you had had anal sex with him before?

A. Yes.

Q. And on how many occasions had he had anal sex with you?

A. Twice.

Q. And do you recall at whose request that occurred?

A. [Sandoval's].

Q. Had you ever had anal sex in the past?

A. With others?

Q. Yes, with other people.

A. No."

No objection to this testimony was made by the defense counsel. On cross-examination, the complainant again reiterated that she had not had anal intercourse with others. Defense counsel, in an attempt to impeach the complainant, then asked "Okay. Now you know a fellow named ---." The State's Attorney objected to the question, basing the objection on the preclusion of such testimony in the provisions of the rape shield statute. Although the trial court initially indicated that the defense could, in its case in chief, bring in testimony to impeach the complainant because the prosecution had "opened the door," the court later reversed that

ruling. Having reviewed the rape shield statute, the court found that such testimony was excluded under the provisions of the statute. Out of the hearing of the jury, the court admonished both the defense counsel for not objecting to the original question posed by the prosecution, and the prosecutor, for asking a question precluded by the statute. The court indicated to counsel, outside the presence of the jury, that the defense could not ignore the strictures of the rape shield statute by failing to objection and then attempt to premise its case on information precluded under the statute. Defense counsel, by offer of proof for the record and out of the hearing of the jury, indicated that a certain male individual would have testified that, when he dated the complainant, they engaged in anal sex.

Following the court's denial of defense counsel's motion for mistrial and just prior to giving the jury instructions, the court, on defense counsel's motion, instructed the jury to disregard the complainant's testimony that she had not had anal sex with others. Rather than allow further inadmissible testimony

to further taint the trial, the court struck the complainant's testimony.

The trial court also rejected defense counsel's attempts to impeach the complainant's testimony, elicited on cross-examination, that the incident with Sandoval had changed her relationship with men and that she had been unable to date since the occurrence. Defense counsel questioned complainant about her presence at a certain bar, just a few days before the trial, with another gentleman. When the complainant denied being on a date, defense counsel indicated to the court that he wished to impeach with a witness who would testify that he saw the complainant, just a few days before the trial, at a local bar "hanging all over a gentleman friend of hers." The trial court refused to admit this evidence.

Sandoval appealed his conviction, arguing that the court's refusal to allow him to challenge the complainant's testimony denied him his constitutional right to confront and cross-examine the witness against him. The appellate court did not reach the constitutional issue on the impeachment testimony about past

sexual experiences, however. Rather, it looked to the language of the statute and concluded that the rape shield statute did not preclude a complainant from testifying about her own past sexual activities, or lack thereof, with third parties. In essence, the appellate court found that the complainant's own waiver of the statute's protection precluded assertion of that protection as a shield against the defendant. As to the complainant's testimony that she had not dated, without citation to authority, the appellate court also reversed. The court reasoned that since the case "came down to an evaluation by the jury of the credibility of complainant and defendant" (178 Ill.app.3d at 677, 127 Ill.Dec. 898, 533 N.E. 2d 980), the defendant's impeaching evidence was allowable as relevant to the believability of [complainant's] accusations against defendant" (178 Ill.App.3d at 678, 127 Ill.Dec. 898, 533 N.E.2d 980).

For the reasons stated below, we reverse the judgment of the appellate court.

[1] Prior to enactment of the rape shield statute in 1978 (Ill. Rev. Stat.

1978, ch 38 par. 115-7), to a certain extent a victim's sexual history was admissible at trial when the affirmative defense of consent was alleged by the defendant. However, any testimony offered was strictly limited by the courts to the victim's general reputation for immorality and unchastity (*People v Collins* (1962), 25 Ill.2d 605, 611, 186 N.E.2d 30; see also *People v Ellison* (1984), 12 Ill.App.3d at 624, 79 Ill.Dec. 37, 463 N.E.2d 175). This court noted in *Collins* that, since lack of consent was an element of the complaint, "it is permissible, in order to show the probability of consent by the prosecutrix, that her general reputation for immorality and unchastity be shown. The underlying thought here is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman * * *." (*Collins*, 25 Ill. 2d at 611, 186 N.E.2d 30.) It has been averred that the premise of this rationale was based on the presumption that "[t]ruthfulness and chastity in women were thought to be virtues that were found only together. No 'unchaste' woman was expected to be truthful." (Murphy,

Rape Shield Statute Upheld by Illinois Appellate Court, 69 Ill. B.J. 110 (1980) (hereafter cited as Murphy, *Rape Shield Statute*).) Support for acknowledgment of the prevalence of such a presumption is found in clear judicial statements: "'It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman.'" Murphy, *Rape Shield Statute* at 100, quoting *State v Sibley* (1895), 131 Mo. 519, 531-32, 33 S.W. 167, 171.

The rape shield statute departs dramatically from the court's prior position. Effective January 4, 1978, the rape shield statute provides:

> "a. In prosecutions for [rape or deviate] sexual assault * * *, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.
>
> b. No evidence admissible under this Section shall be introduced unless ruled admissible by the trial judge after an offer of proof has been

> made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. Such offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim and the defendant. Unless the court finds that reasonably specific information as to date, time or place, or some combination thereof, has been offered as to prior sexual activity with the defendant, counsel for the defendant shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim and the defendant." Ill. Rev. Stat. 1987, ch 38, par. 115-7.

The constitutionality of the rape shield statute has been addressed on several occasions by the appellate court (see *People v Buford* (1982), 110 Ill.App.3d 46, 65 Ill.Dec. 721, 441 N.E.2d 1235; *People v Bachman* (1981), 92 Ill.App.3d 419, 47 Ill.Dec. 253, 414 N.E.2d 1369; *People v Cornes* (1980), 80 Ill.App.3d 166, 35 Ill. Dec. 818, 399 N.E.2d 1346), though it has not been addressed by this court. We

note that in the case before us, the appellate court did not address the constitutionality of the statute; rather, it reached its decision based on statutory construction. (178 Ill.App3d at 677, 127 Ill.Dec. 898, 533 N.E.2d 980.) Noting that a court of review will not decide constitutional questions when the matter can be disposed of on other grounds. (178 Ill.App.3d at 677, 127 Ill.Dec. 989, 533 N.E.2d 980, citing *People v Fleming* (1971), 50 Ill.2d 141, 144, 277 N.E.2d 872), the appellate court looked to the "factors which prompted the rule" and determined that the rule "does not preclude an exception for admission of the impeaching evidence offered by defendant in this case." (178 Ill.App. 3d at 674, 127 Ill.Dec. 898, 533 N.E.2d 980.) Having determined that the proffered evidence was relevant because the case rested on the complainant's credibility, the court concluded:

> "Where the evidence is relevant and is introduced, not to harass the witness but only in a defensive response to the alleged victim's own initiative, the statute does not preclude an exception to the general protective umbrella it places over victims of sexual

> assault. Once a complainant decides to address her own past sexual conduct, or lack of it, she relinquishes the statutory protection and risks a challenge to the truthfulness of her version of that conduct." 178 Ill.App.3d at 676, 127 Ill.Dec. 898, 533 N.E.2d 980.

We do not find the appellate court's construction of the statute persuasive. The language of the statute, quoted its entirety above, is concise and precise. Resort to legislative history--the factors which prompted the rule--is necessary only when the statute is vague or ambiguous and clarification of the underlying intent is needed to assist interpretation of the language. (*People v Boykin* (1983), 94 Ill.2d 138, 141, 68 Il.Dec. 321, 445 N.E.2d 1174.) The rape shield statute is neither vague nor ambiguous. We note that the statute does not limit its proscription to a defendant's attempts to introduce evidence of the victim's prior sexual encounters; the statute says quite simply that "the prior sexual activity * * * is inadmissible." (Ill.Rev.Stat. 1987, ch 38, par. 115-7(a).) The words of limitation which

follow do not indicate that only the defendant is prohibited from introducing such evidence; the exception addresses only the "past sexual conduct of the alleged victim with the accused." Ill.Rev.Stat. 1987, ch. 38, par. 115-7(a).

The clear and unambiguous language of the statute has been noted by the appellate court in several cases. The court in *People v Cornes* (1980), 80 Ill.App.3d 166, 175, 35 Ill.Dec. 818, 399 N.E.2d 1346, noted:

> "A reading of the * * * statute reveals that the legislature clearly and unequivocally abrogated the old Illinois rule permitting reputation evidence of the complainant's chastity and immorality as it pertained to the issue of consent. [Citation.] The express language of the rape shield law precludes the admission of evidence of prior sexual activity and reputation of the complainant except when it concerns the past sexual conduct of complainant with the defendant."

Cornes involved a defendant who was precluded from putting on testimony about the complainant's abortion and about her reputation for chastity, information

which the defendant asserted was necessary to show the closeness of his relationship with the complainant. The court noted that under either, the old Illinois common law or the current statute, the defendant could not put into evidence specific acts of the complainant or her general moral reputation. *Cornes,* 80 Ill.App.3d at 173-75, 35 Ill.Dec. 818, 399 N.E.2d 1346.

A similar result was reached in *People v Ellison* (1984), 123 Ill.App.3d 615, 79 Ill.Dec. 37, 463 N.E.2d 175. In construing the language of the statute, the court noted that "it is clear the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning prior sexual conduct of the alleged victim with the accused." *Ellison,* 123 Ill.App.3d at 623, 79 Ill.Dec. 37, 463 N.E.2d 175.

We find the statutory analysis of the appellate court in *Cornes* and *Ellison* persuasive. The language of the statute is clear and unambiguous; it leaves no room for introduction of reputation or specific-act evidence from any party in the action.

We note that even were we to find that the language of the statute is vague or ambiguous, a review of the legislative history supports a construction which prohibits anyone from introducing evidence of the victim's sexual history unless it relates to the relationship between the victim and the accused.

The first draft of House Bill 760 allowed admission of evidence relating to the victim's general reputation for chastity. The Governor amendatorily vetoed the act, stating in a letter to the HOuse of Representatives that "neither the victim's prior sexual activity nor her reputation should ever be inquired into in a rape case unless she was previously involved with the alleged rapist." (Emphasis added.) (Letter from Governor James Thompson to the Illinois House of Representatives (Oct. 24, 1977), reprinted in J. Ill.H.R., No. 4, 80th Ill. Gen. Assem. 6404 (1977), as quoted in Comment, *The Illinois Rape Shield Statute: Privacy Act Any Cost?*, 15 J. Mar. L.Rev. 157, 164 (1982).) The present form of the statute, incorporating the Governor's amendments, was adopted by the House overwhelmingly. (See 80th Ill. Gen. Assem., House

Proceedings, November 3, 1977, at 59 (motion to concur in amendatory veto on House Bill 760).) The Senate concurred. (See 80th Ill. Gen. Assem., Senate Proceedings, November 22, 1977, at 10 (motion to accept the specific recommendations of the Governor as to House Bill 760); see also *People v Ellison* (1984), 123 Ill.App.3d 615, 623-24, 79 Ill.Dec. 37, 463 N.E.2d 175 (discussing the legislative history of House Bill 760); Comment, *The Illinois Rape Shield Statute,* 15 J. Marshall L.Rev. at 162-64 (same).) The statute in its present form precludes admission of evidence of the sexual history of the victim unless it relates to sexual conduct with the defendant.

[2] Having found that the statutory language clearly precludes the admission of prior sexual acts of the victim, we turn now to consider defendant's constitutional attack on the statute. Sandoval asserts that the rape shield statute unconstitutionally denied him the right to confront the witness against him when the trial court excluded the testimony of a proffered witness. This witness would have testified that he had at one time dated the complainant and that they had

engaged in anal sex which at times was initiated by the complainant. The testimony was essential, Sandoval argues, to rebut the complainant's testimony on direct examination that she had not had anal sex with others prior to her involvement with Sandoval. Sandoval further asserts that admission of the proffered impeachment testimony is controlled by *Davis v Alaska* (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347.

The Illinois Constitution provides: "In criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face * * *." (Ill. Const. 1970, art. I, §8.) The United States Constitution, with provisions applicable to the States under the Fourteenth Amendment, similarly provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const., amend. VI.

It is well accepted that "a primary interest secured by [the confrontation clause] is the right of cross-examination." (*Douglas v Alabama* (1965), 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934, 937.) The extent or scope

of this primary interest, the right of cross-examination, was reviewed by the Supreme Court in *Davis v Alaska* (1974), 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347. At issue in *Davis* was the right of the defendant to question an adverse witness about his juvenile adjudication for burglary resulting in a probation. The defendant theorized that because the witness was on probation when the stolen property was found near his home, he would have been prone to make a quick (and perhaps erroneous) identification of suspects seen near his home in order to assure that police attention would not center on himself. The trial court granted the prosecutor's motion for a protective order, however, under an Alaska statute which precluded the defendant from asking about the witness' juvenile record. The order further prevented the defendant from rebutting the witness' assertion during cross-examination that he had never been questioned by law enforcement officers before, clearly an untruthful statement in light of his prior record. The Supreme Court, in holding that the defendant had been denied his right under

the confrontation clause to cross-examine, noted:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.

> The partiality of a witness is subject to exploration at trial and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' [Citation.] We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citation.]" 415 U.S. at 316, 94 S.Ct. at 110, 39 L.Ed.2d at 353-54.

We have quoted from *Davis* at some length to highlight the types of situations in which the Supreme Court has indicated that the right of confrontation through cross-examination guaranteed under the constitutions supersedes a statutory right granted a witness or a policy of the State. With the *Davis* decision, the Court does not present the defense with a blanket invitation to attack a witness. Rather, *Davis* limits such an attack to situations where the confrontation is both relevant and based on a showing of bias, prejudice or motive. Thus, *Davis* stands for the proposition that not even a statute can be used to shelter a witness whose motive,

prejudice or bias may affect testimony before the court. The emphasis of *Davis* was not to create an exception to the statutory protection, but to prevent the statute from creating an exception to the well-settled and accepted admissibility of the motive, bias or prejudice of a particular witness.

The Court in *Davis* evaluated the constitutional right of the defendant based on a defendant's opportunity to present the theory of his case. The defendant merely attempted to show, in *Davis*, the possible motive or bias of the witness who might have reason to offset suspicion from himself, because of his own past record, by hastily identifying suspects. Had this theory been before the trial court, the resulting verdict may have been different. (415 U.S. at 319, 95 S.Ct. at 1111-12, 39 L.Ed.2d at 355.) The Supreme Court protected the defendant's right to fully explore a theory of defense before the jury or the court which would be making the decision. 415 U.S. at 318, 94 S.Ct. at 1111, 39 L.Ed at 354-55.

Sandoval's reliance on *Davis* is

misplaced. The case before this court, although also analyzing a statute which ultimately served to prevent certain information about an individual from being considered by the jury, presents a quite different scenario.

Sandoval's theory at trial was that the woman scorned (complainant) was out to even the score. The jury heard Sandoval's testimony wherein he indicated that the complainant initiated the sexual encounter, that after a time of having sex the defendant decided that the relationship would not work, that he then told complainant to leave, and that this charge of rape is a retaliation for rejection. We fail to see, and Sandoval has not explained, what impact complainant's prior sexual encounters with a third party would have on this theory. Properly rejected is the old theory that a woman's sexual morality bears a direct relationship to her truthfulness' therefore, no correlation can be made as was made in *Davis* between a witness' prior record and the witness' credibility). Nor do we perceive how the proffered testimony would reveal the witness' bias, prejudice or motive to testify falsely in

charging the defendant (particular attack on the witness' credibility. Even were the proffered testimony true, the fact that complainant had engaged in anal sex in a prior relationship has no bearing on the present sexual assault charge merely because the information is also about a sexual practice.

The activities under scrutiny by a trial court in a case alleging sexual assault must relate to the exchange between the complainant and the person accused, that is whether the sexual attentions were forced upon another without consent. (See Ill.Rev.Stat. 1987, ch 38, par. 12-13.) Here it appears from our review of the record that the accused is attempting to do precisely what the rape shield statute was enacted to prevent: to divert the jury's attention from the accusation against him (forcing the complainant to perform sexual acts, acts which defense counsel stressed might offend the sensibilities of some) by offering testimony that would indicate that this complainant had not only initiated similar sexual acts in the past with the defendant, but had also initiated such acts with others.

Sandoval's rationale, moreover, places undue emphasis on the particular type of sexual act or method of the act rather than on the force and dominance of one over another with the use of sex. An emphasis that complainant had engaged in anal sex with other would only serve to accentuate the particular type of sexual contact rather than the use of force to accomplish contact. To emphasize a particular type of sexual conduct is to emphasize form over substance, triggering the "sensibilities" of the jurors rather than encouraging a fact-based decisional process.

This case does not present a situation in which the jury was presented with what the defendant alleges is a completely unbelievable portrait of the complainant which is only rebuttable with introduction of the proffered testimony. We note that the fact that complainant was sexually experienced would have been evident to the jury, for it was clear from the testimony that she was a 20-year-old mother of a two-year-old child. Additionally, both complainant and defendant testified that they had lived together for several months in a sexual

relationship and that they had engaged in anal sex on a number of occasions. That the number of times differed was a matter that went to credibility. We find that any concern over a number is entirely misplaced, for complainant's possible acquiescence became a question for the jury when complainant testified that she had engaged in anal sex with defendant on more than one prior occasion. Moreover, we note that it is not the role of this court to judge "specific actions" (*i.e.*, anal sex or oral sex) based on whether those particular acts, in and of themselves, offend our sensibilities; rather, we must determine whether the basic elements of the offense charged have been proven (here, the elements are whether sexual penetration was accomplished through use of force or threat of force). Information about the complainant's prior sexual practices does not have any bearing on the charge levied against Sandoval by the complainant.

The Appellate Court has long recognized that under the rape shield statute the complainant's prior sexual activities are <u>irrelevant</u> to a sexual assault charge unless those activities involved the

complainant and the accused. Indeed, the rape shield statute has survived constitutional review in the Appellate Court against attack similar to that now under consideration: The Court in *People v Cornes* noted:

> "Defendant's right of confrontation necessarily includes the right to cross-examine witnesses, but that right does not extend to matter which are irrelevant and have little or no probative value. Complainant's past sexual conduct has no bearing on whether she has consented to sexual relations with defendant. The legislature recognized this fact and chose to exclude evidence of complainant's reputation for chastity as well as specific acts of sexual conduct with third persons in cases of rape and sexual deviate assault. * * * The legislature was acting well within its powers in enacting reasonable legislation intended to eliminate the cruel and abusive treatment of the victim at trial by precluding the admission of prejudicial and irrelevant material and to promote the lawful administration of the criminal justice system." 80 Ill.App.3d at 175-76, 35 Ill.Dec. 818, 399 N.E.2d 1346.

In *People v Buford* (1982), 110

Ill.App.3d 46, 65 Ill.Dec. 721, 441 N.E.2d 1235, the Court specifically addressed the defendant's right of confrontation in light of *Davis v Alaska* and rejected the defendant's allegation that he was not allowed to confront the witness.

The trial court's application of the rape shield statute in *Buford* prevented the defendant from showing that the complainant had previously been convicted of solicitation for prostitution in 1972. (110 Ill.App.3d at 50, 65 Ill. Dec. 721, 441 N.E. 2d 1235.) Defendant contended that because the complainant was currently on Federal probation for a 1978 mail fraud charge, she had a motive to fabricate her testimony in order to prevent an inference that she was working as a prostitute, thereby protecting her probation. (110 Ill.App.3d at 50, 65 Ill.Dec. 721, 441 N.E.2d 1235.) The defendant testified that he had known the complainant since 1972 when he met her in an area of Chicago frequented by prostitutes. Since that time he had paid her weekly to have sex. Complainant testified on both direct and cross-examination that she did not know the defendant and

had never seen him before the night of the attack. (110 Ill.App.3d at 49, 52, 65 Ill.Dec. 721, 441 N.E.2d 1235.) The defendant argued that acknowledgement or testimony indicating that the complainant had been convicted of solicitation in 1972 would affect her probation; therefore, she had to fabricate the charge of sexual assault. The court noted that the 1972 conviction had no present relevance to the 1978 probation and that, additionally, defense counsel had opportunity to cross-examine the complainant and to present the defendant's testimony about the relationship between the parties before it concluded:

> "In *Davis*, the [C]ourt noted that the defense was confronted with a situation in which the jury simply could not be made aware of the defendant's theory of the case. In the instant case, the defense presented its theory of the case at length. * * *''Complainant's past sexual conduct has no bearing on whether she has consented to sexual relations with defendant.' [Citation.]" 110 Ill.App.3d at 52, 65 Ill.Dec. 721, 441 N.E.2d 1235.

The Appellate Court again reviewed the statute under a constitutional attack

which asserted that the rape shield statute "abrogat[ed] * * * [defendant's] sixth amendment right to present a full and fair defense" in *People v Ellison* (1984), 123 Ill.App.3d 615, 622, 79 Ill.Dec. 37, 463 N.E.2d 175. The defendant in *Ellison* based one of his arguments on appeal on the trial court's preclusion of evidence concerning the victim's "sexual experience or reputation for sexual activity." (123 Ill.App.3d at 625, 79 Ill.Dec. 37, 463 N.E.2d 175.) The Appellate Court rejected defendant's argument that *Davis v Alaska* was dispositive, relying on the Supreme Court's citation in *Davis* to *Chambers v Mississippi* (1973), 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, and noted that the Court "held that the constitution requires that the competing interests of the defendant's right of confrontation and the State's public policy for enacting the rule be closely examined and a balance struck." (*Ellison*, 123, Ill.App. 3d at 625, 79 Ill.Dec.37, 463 N.E.2d 175.) The *Ellison* court further noted that:

"The State policy underlying the rape shield statute * * * is to prevent

the defendant from harassing and humiliating the prosecutrix at trial with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than the defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant. Further, exclusion of such evidence keeps the jury attention focused only on issues relevant to the controversy at hand. Last, but not necessarily least, the exclusion promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their past sexual activity brought before the public." (123 Ill.App.3d at 626, 79 Ill.Dec. 37 463 N.E.2d 175.)

Although the defendant argued that the proffered testimony was crucial to his defense because "the case * * * 'boiled down to the word of the prosecutrix against [his]'" (123 Ill.App.3d at 626-27, 79 Ill.Dec. 37, 463 N.E.2d 175), the Court concluded that the defendant's need for the excluded evidence was not clearly shown.

Sandoval argues that this case, like

Ellison, boils down to the jury's determination of the credibility of the parties and he was denied the opportunity to confront the witness with what he alleges was a lie. He also argues that, unlike *Ellison*, this case centers on complainant's testimony on direct examination, rather than on testimony elicited under cross-examination.

We note, however, that the testimony which Sandoval wished to introduce, as was also the case in *Ellison*, was not relevant to the matter being tried. The testimony would have added no information which could have helped the jury decide whether or not the complainant had been forced to have sex with the defendant on this occasion. Sandoval was not prevented from presenting his theory of the case. Indeed, he testified that fighting and making love was a pattern he and complainant repeated often; he testified that anal sex was often initiated by the complainant and that they had engaged in this type of sex on at least a dozen occasions; he testified, and it was corroborated by testimony from defendant's brother, that the complainant had

physically hit the defendant on a prior occasion when she was angry and then falsely accused the defendant of striking her; Sandoval also testified that complainant threatened him when she left the apartment. See *Buford,* 110 Ill.App.3d at 52, 65 Ill.Dec. 721, 441 N.E.2d 1235 (where the court held that limitation on cross-examination did not infringe defendant's right of confrontation where the defendant had opportunity to present his theory of the case).

Even if this court were to assume that the complainant was not truthful when she testified that she had not had anal sex with others, we would not be required to reverse the verdict of the jury based on a denial of defendant's right of confrontation. Impeachment of a witness is restricted to relevant matters; a witness may not be impeached on collateral or irrelevant matters. *People v Collins* (1985), 106 Ill.2d 237, 269, 87 Ill. ec. 910, 478 N.E.2d 267; *People v Columbo* (1983), 118 Ill. App.3d 882, 966, 74 Ill.Dec. 304, 455 N.E.2d 733.

People v Columbo is helpful in analyzing

this situation. In *Columbo,* a murder trial, a prosecution witness was called who had been involved in a sexual relationship with the co-defendant, Frank DeLuca. During this relationship, DeLuca had taken photographs of the witness performing "unnatural sexual acts with other men, a woman and a dog." (118 Ill. App.3d at 963, 74 Ill.Dec. 304, 455 N.E. 2d 733.) When the relationship ended, DeLuca told the witness that he had burned the pictures; the pictures were not burned, however, and ended up in the possession of defense counsel prior to the trial. Following the State's motion *in limine* to preclude the defendant from cross-examining the witness about these pornographic photographs, the Court carefully delineated the scope of any questions regarding the photographs. At trial, the witness specifically denied ever participating in certain sexual acts with a woman and with a dog--statements which defendant could prove were lies by showing particular photographs or by further cross-examining the witness. The trial court denied defendant's efforts to impeach the witness. The Appellate Court upheld the Trial Court, noting that the

particular sexual acts were unrelated to the material issue of homicide and that a witness may not be impeached on a collateral matter. (118 Ill.App.3d at 966-67, 74 Ill.Dec. 304, 455 N.E.2d 733.) The Court further noted that the defendant had ample opportunity to show that the witness's decision to testify may have been based on efforts at retaliation for not returning the photographs, that is, the witness may have been biased. 118 Ill.App.3d at 967, 74 Ill.Dec. 304, 455 N.E.2d 733.

Both the legislature and the courts have found that a complainant's prior sexual history is irrelevant in a trial for sexual assault. Since prior sexual history is irrelevant, as in *Columbo,* the witness may not be impeached on irrelevant or collateral matters. See also *People v Schott* (1976), 39 Ill.App.3d 266, 272-73, 350 N.E.2d 49 (where the court upheld the trial court's denial of defendant's efforts to impeach a witness by offering the testimony of another person to show that a State witness' testimony on direct examination was false when he testified that he had gone to a particular farm to buy a gun (and not

drugs as defendants alleged); defendants were on trial for robbery of a victim they claimed to have gone to see in order to buy drugs and they asserted that it was necessary to impeach the witness to verify that the victim did indeed sell drugs).

Sandoval further argues that impeachment testimony was necessary because the complainant's statement that she had not engaged in this particular type of sex before would have given greater weight to her statement that she did not consent to the sexual encounter, that in fact she begged Sandoval not to do it because that kind of sexual encounter hurt. Complainant's assertion could have been rebutted by testimony that she had engaged in this particular type of sex on numerous occasions with another. Whether the complainant had participated in this particular sexual practice 2 times or 20 times has no bearing, however, on whether a particular instance of sex was consented to or was painful. (See Ill. Rev. Stat. 1987, ch 38, par. 12-13 9(a) (1).) Nor, we note, is it an element of the statute that the assault be painful. Mere absence of pain during or even

enjoyment of particular sexual practices with certain individuals does not equate to absence of pain or enjoyment of the particular practice in all circumstances; nor, we note does it have any bearing on the issue of consent. An act performed with gentleness on one occasion may be quite different than that same act performed with anger, hostility, or vehemence. Thus, even had complainant initiated anal intercourse with others in the past, we fail to see its relevance to the charges levied against Sandoval.

The Supreme Court of Michigan was faced with the task of determining the constitutional application of its rape shield statute in *People v Hackett* (1984), 421, Mich. 338, 365 N.W.2d, 120. *Hackett* is a consolidated case presenting two distinct factual backgrounds. In each instance, the court held that introduction of evidence about the sexual history of the complainant was inadmissible.

The first of the consolidated cases involved a defendant who "sought to introduce specific instances of the complainant's prior homosexual conduct with prisoners of the same race as defendant to circumvent the inference

that it would be improbable that a white male prisoner would consent to sodomy by a black male prisoner." (421 Mich. at 351, 365 N.W.2d at 126.) In upholding the trial court's exclusion of the proffered testimony, the court noted:

> "Like prostitution, the fact that a person is a homosexual, standing alone, has little or no logical relevance between the excluded prior sexual acts evidence and the issues of consent or credibility. Thus, to the extent defendant sought to introduce evidence as to complainant's reputation as a homosexual or to specific acts of homosexuality for the purpose of bolstering his defense of consent, we find such evidence irrelevant." (421 Mich. at 353, 365 N.W.2d at 126-27.)

The court indicated that "there is no logical nexus between a complainant's reputation for unchastity, whether it involves heterosexual or homosexual activity, and the character trait for truthfulness or untruthfulness." 421 Mich. 352, 365 N.W.2d at 126.

In the second of the consolidated cases the defendant sought to introduce evidence of the complainant's reputation for unchastity, a specific instance of

prior sexual conduct, and a statement made by the complainant about her unhappy marital situation. The court noted that the right to confrontation "requires only that the defendant be permitted to introduce relevant and admissible evidence." (421 Mich. at 354, 365 N.W.2d at 127.) Neither reputation evidence nor evidence of a specific instance of conduct with a third party has any relevance to the issue of complainant's consent with the defendant. Although the court recognized that certain "extraordinary circumstances (421 Mich. at 355, 365 N.W.2d at 128) could make such information relevant, it concluded that the case before it did not present such a situation.

The Michigan Supreme Court described those "extraordinary circumstances," those instances in which it indicated that information about the prior sexual history of a complainant could be relevant and necessary to preserve a defendant's constitutional right to confrontation. The court noted:

> "For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose

> of showing the complaining witness' bias, this would almost always be material and should be admitted. [Citations.] Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. [Citations.] Additionally, the defendant should be permitted to show that the complainant has made false accusations of the rape in the past." (421 Mich. at 348, 365 N.W. 2d at 124-25.)

In a footnote, the court also noted the "extraordinary circumstances" accepted by a Federal court as examples of circumstances which would enhance the probative value of the proffered evidence:

> "'evidence [which] is explanative of a physical fact which is in evidence at trial, such as the presence of semen, pregnancy, or victim's physical condition indicating intercourse, or where the evidence tends to establish bias, prejudice, or motive surrounding the charge of rape. Sexual history might also be relevant where the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately in issue.'" 421 Mich. at 355 n.

> 4, 365 N.W.2d at 128 in 4, quoting *United States v Kasto* (8th Cir. 1978), 584 F.2d 268, 271 n. 2.

The Federal case cited by the Michigan court is similar to another Federal case which Sandoval argues is dispositive of the issue before this court. In *United States ex rel. Fuller v Attorney General* (N.D. Ill. 1984), 589 F.Supp. 206 *aff'd mem.* (7th Cir. 1985), 762 F.2d 1016, the court noted the same "circumstances" quoted above which list times when more extensive cross-examination may occur or testimony be introduced. Sandoval emphasizes before this court the exception which would admit evidence where the victim has engaged in a "prior patter of behavior", presumably, though not specifically articulated, on the assumption that a patter of engaging in anal sex fits the exception. We are not prepared to conclude that testimony from another man that the complainant and he had engaged in anal sex fits the "prior pattern" exception, for to do so would require us to determine that the particular practice was so unusual, so outside the norm, that it had distinctive characteristics which

make it the complainant's *modus operandi.* Even scholars and practitioners who advocate a change in the rape shield statutes discuss and describe this exception for "patter of behavior" as similar to cases where pattern evidence is admitted because it shows the individual's unique "signature." (See generally Galvin, *"Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade,"* 70 *Minn. L. Rev.* 763, 830-48 (1986); Tanford & Bocchino, *"Rape Victim Shield Laws and the Sixth Amendment,"* 128 *U. Pa. L. Rev.* 544, 586-89 (1980).) The mere fact that the complainant had engaged in anal sex with another partner at some time in the past is not such a distinctive act as to make it probative or relevant to the charges against Sandoval.

Cases from other States which have allowed proffered testimony that at first blush appears to bring a complainant's sexual history to the fore are not dispositive of the situation before us. The cases are but manifestations of the exceptions already noted by the cases discussed above. The cases allowed testimony to show the possibility that

another had caused a pregnancy (*Shockley v State* (Tenn. 1978). 585 S.W.2d 645); to show the complainant's possible motive to falsely accuse the defendant (*State v Jalo* (1976), 27 Or.App. 845, 557 P.2d 1359; see also *Olden v Kentucky* (1988), 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (State's rape shield law did not bar testimony that complainant and third party were living together when that testimony was relevant to the accused's theory (complainant's motive to lie) of the case that complainant consented to the sexual encounter with the accused, but alleged rape rather than jeopardize her relationship with the third party who saw her get out of the accused's car and who happened to also be a State's witness in the case against the accused); to show that the complainant had filed false charges of rape in the past (*Smith v State* (1989), 259 Ga. 135, 377 S.E.2d 158; *Stewart v State* (Ind. 1988), 531 N.E.2d 1146); and to show the sexual activities of the complainant prior to the alleged rape where such activities might explain physical injuries (*State v LaClair* (1981),

121 N.H. 743, 433 A.2d 1326).

Though not cited by Sandoval, our review uncovered one case which does not fit neatly into the noted exceptions. *State v Williams* (1986), 21 Ohio St.3d 33, 487 N.E.2d 560, however, is not dispositive of the situation now before this court. *Williams* involved the court's review of a complainant's testimony on direct examination that she did not consent to sex with the defendant. The defendant testified at a pretrial hearing that he had numerous prior sexual encounters with the complainant, that she was a prostitute and he was her pimp. At trial the complainant testified that she did not consent to sex with defendant because she never consented to sex with men since she is a lesbian. The trial court denied defense attempts to have a witness as to his prior sexual relations with the victim and to admit testimony as to the victim's reputation as a prostitute. The Ohio Supreme Court noted that, since a key factor in the case was consent, although the victim's credibility would be impeached with admission of testimony relating the accused's relationship with her or her reputation as a prostitute,

the "proffered evidence has a more important purpose, which is to negate the implied establishment of an element of the crime charged. For this reason, the probative value of the testimony outweighs any interest the state has in exclusion." (21 Ohio St.3d at 36, 487 N.E.2d at 563.) The court found that the rape shield law as applied violated the defendant's right of confrontation.

At the core of the *Williams* case was the issue of consent based on complainant's claim that she never consented to sex with me. This claim, if believed by the jury, would bolster complainant's assertion that she therefore did not consent with defendant on this occasion. In the case before us, Sandoval and the complainant acknowledged that they had engaged in sex on prior occasions. Moreover, both acknowledged that they had engaged in anal sex on prior occasions, although their testimony indicated differing attitudes about the practice. Unlike *Williams*, the issue in this case was whether there was consent to engage in sex on this given occasion with Sandoval, not whether there was consent to engage in a particular variation of sexual

contact. Complainant did not deny engaging in anal sex with the defendant on prior occasions, nor did she deny having a sexual relationship with the defendant. Whatever particular sexual practices she engaged in with other men, such testimony would not impact testimony about her actions with the defendant. *Williams* is therefore not helpful to Sandoval's case.

Nor do we find reliance on United States Supreme Court decisions dispositive in this case. In *Walder v United States* (1954), 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503, the Court addressed the application and scope of the doctrine of *Weeks v United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. *Weeks* precluded the prosecution from utilizing evidence procured in violation of the fourth amendment to secure a conviction. (*Walder*, 347 U.S. at 64-65, 74 S.Ct. at 356, 98 L.Ed. at 507.) *Walder* involved a defendant's appeal from a conviction for transactions in narcotics in 1952. The defendant had also been indicted for similar offenses in 1950; the 1950 case

was dismissed when the court ruled that the evidence, a heroin capsule, was inadmissible because of an unlawful search and seizure. At trial on the 1952 indictment, the defendant testified that he had never purchased, sold or possessed illegal narcotics. The prosecution then questioned him about the heroin capsule taken from his home in 1950; the defendant denied that any narcotics were taken from him at that time. In upholding the trial court's admission of extrinsic evidence to impeach the defendant's contention, the Court noted:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.." (347 U.S. at 65, 74 S.Ct. at 356, 98 L.Ed. at 507.)

The Court reasoned that "of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or

possessed any narcotics" before noting that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. at 65, 74 S.Ct. at 356, 98 L.Ed. at 507.

Use of the prior inadmissible evidence in *Walder* was specifically limited by the trial court as being "solely for the purpose of impeaching the defendant's credibility." (347 U.S. at 64, 74 S.Ct. at 355, 98 L.Ed at 506.) In the case before us, however, the defendant had ample opportunity to challenge the credibility of the complainant without resort to additional extrinsic evidence, evidence which courts and the legislature have labelled highly prejudicial. Sandoval and others testified as to the relationship that Sandoval had with the complainant; testimony was offered by Sandoval's brother which supported the allegation that the complainant had at times been the aggressor in their relationship and had falsely accused Sandoval in the past of abusive treatment; testimony further alleged that Sandoval and complainant had often engaged in anal

sex. Unlike the situation in *Walder,* in which the only means the prosecution had to challenge the credibility of the defendant was by the use of the prior evidence, the credibility of the complainant in the case before us was clearly before the jury for review. No further attach merely on an issue of credibility was necessary.

Harris v New York (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, relied on by Sandoval, is similarly inapposite. *Harris* involved use of a prior statement made by the defendant, inadmissible in the prosecution's case in chief under *Miranda v Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, to impeach the credibility of the defendant when he denied on the witness stand making a ale of heroin to an undercover policeman. The Court noted that it "odes not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfied legal standards." *Harris,* 401 U.S. at 224, 91

S.Ct. at 645, 28 L.Ed.2d at 4). The proviso noted by the Court was elaborated upon in its concluding statements: "The shield provided by Miranda cannot be perverted into a license to use perjury by ways of a defense, free from the risk of confrontation with prior inconsistent utterances." (401 U.S. at 226, 91 S.Ct. at 646, 28 L.Ed.2d at 5). Impeachment was based on utilization of a prior inconsistent statement by defendant who was privileged to testify in his own defense, though he was not required to do so. Thus, the waiver of the general principle of exclusion of statements taken in violation of *Miranda* was not based on any deficiency or constitutional problem with *Miranda*, but because the defendant chose to take the stand and make statements inconsistent with prior statements on matters that were relevant and probative.

In the case before us, even if we were to assume that the complainant lied when she denied having anal sex with others, we fail to see how *Harris* applies; though not specifically relevant to the charges, it was clear that complainant

had sex with others in the past, that the complainant had made no prior statements about her sexual history with parties other than the defendant, nor was the information relevant or probative of any fact in issue other than to attack the complainant's credibility.

In summary, although various Supreme Court cases have limited application of rules or statutes which preclude use of certain evidence, in each case the Court was recognizing the preeminence of longstanding rules of evidence: in *Davis*, that bias, motive or prejudice could be shown; in *Walder*, that defendant's prior "crimes" could be used to impeach when he chose to testify; in *Harris*, that prior inconsistent statements are admissible to impeach.

Although we certainly recognize that there may be certain situations in which the preclusion of the rape shield statute may not apply because of the defendant's greater constitutional right to confrontation, we need not specifically adopt the rationale of our sister State courts since we conclude that we are not here confronted with an applicable situation

demanding emphasis of the right of confrontation over the preclusion of the rape shield statute.

The trial court did not err in excluding the proffered testimony of someone who would testify that he had anal sex with the complainant. The complainant's original statement that she had not had anal sex with others was clearly inadmissible under the rape shield statute, as already noted. Such error would not have been cured, however, by further compounding the problem with admission of more evidence precluded by the statute. We are not required to remand this case for a new trial, however, because, the trial judge, prior to submission of the case to the jury, properly instructed the jury to disregard the complainant's statement that she had not had anal sex with others before her relationship with Sandoval.

As the State has noted, judicial admonishments to juries are routine; indeed, it is "the almost invariable assumption of the law that jurors follow their instructions." (*Richardson v Marsh* (1987), 481 U.S. 200, 206, 107 S.Ct. 1702, 1707, 95 L.Ed.2d 176, 185, see also

Watkins v Sowders (1981), 449, U.S. 341, 101 S. Ct. 654, 66 L.Ed.2d 549 (jury instructed not to consider erroneously admitted eyewitness identification evidence); *Harris v. New York* (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (jury instructed but to consider statement for impeachment but to disregard as substantive evidence of guilt); *Walder v United States* (1954), 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (same).) Although the Supreme Court has recognized an exception to the general assumption that a jury follows instructions in *Bruton v United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, the Court in *Richardson* noted that *Bruton* only "recognized a narrow exception" (*Richardson*, 481 U.S. at 207, 107 S.Ct. at 1707, 95 L.Ed.2d at 185).

In *Bruton*, co-defendants were tried together; a non-testifying co-defendant's confession which expressly implicated the second defendant presented a situation "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practi-

cal and human limitations of the jury system cannot be ignored." (*Bruton*, 391 U.S. at 135, 88 S.Ct. at 1627, 20 L.Ed.2d at 485.) This case does not present a situation which would require this court to conclude that the jury did not or could not follow instructions.

Furthermore, even were we to conclude that it was error to exclude the rebuttal testimony if the complainant's statements were utilized by the jury in reaching a decision, we would not find error here. The jury was properly admonished to ignore the complainant's statement.

We also note that *People v Sales* (1986), 151 Ill.App.3d 226, 104 Ill.Dec. 561, 502 N.E.2d 1221, which remanded a case for a new trial, addressed the issue of the prosecution's elicitation of statements from the complainant about her sexual history and is not inapposite. In *Sales*, the complainant, when questioned by the prosecution, testified that she had not had sexual relations with anyone in the 10 days prior to the attack and that prior to the attack she had never had sexual relations with anyone. The

Appellate Court noted that "[e]liciting this testimony was clearly prohibited under the Illinois rape shield statute." (151 Ill.App. 3d at 231, 104 Ill.Dec. 561, 502 N.E.2d 1221.) *Sales* supports an analysis prohibiting any reference to a complainant's sexual history or reputation but does not require that Sandoval receive a new trial. Unlike *Sales*, where the jury in Sandoval's case was clearly and unequivocally instructed to ignored the complainant's testimony. As we noted above, errors corrected by the court with instructions to the jury do not require reversal.

The second issue for review involves the trial court's refusal to allow testimony that the complainant had been seen out with a man just prior to the beginning of the trial, Sandoval argues this testimony was necessary to rebut complainant's testimony, first elicited during cross-examination, that she has not been able to date since the incident with the defendant.

{3} This court has long noted that the latitude allowed on cross-examination and rebuttal is a matter within the sound discretion of the trial court; a review-

ing court will not interfere unless there has been a clear abuse of discretion resulting in a manifest prejudice to the defendant. *People v Collins* (1985), 106 Ill.2d 237, 269, 87 Ill.Dec. 910, 478 N.E.2d 267; *People v Peter* (1973), 55 Ill.2d 443, 451-52, 303 N.E.2d 398.

[4] Upon review of the record, we find no abuse of discretion resulting in prejudice to the defendant. What the complainant has done since the incident which resulted in the charges against the defendant has not relevance in a determination of defendant's guilt or innocence. It is well accepted that a cross-examiner may not impeach the witness on a collateral matter; the answer must be accepted. (*Collins*, 106 Ill.2d at 269, 87 Ill.Dec. 910, 478 N.E.2d 267.) The question before the jury was whether the defendant forced the complainant to have anal and oral sex against her will. The subsequent effect on her life, that is, whether or not she was dating, could be offered for no other purpose than to contradict a statement of the complainant. It would present the jury with no additional information about the charge

against the defendant. Absent an abuse of discretion, a reviewing court should not interfere with the trial judge's ruling. *Collins,* 106 Ill.2d at 269-70, 87 Ill.Dec. 910, 478 N.E.2d 267.

For the reasons stated above, we reverse the judgment of the Appellate Court and affirm the judgment of the Circuit Court.

Appellate Court judgment reversed; Circuit Court judgment affirmed.

Justice MILLER, specially concurring:

I concur in the court's judgment affirming the defendant's convictions. I would decide the case on grounds narrower than those relied on by the majority, however, and for that reason I write separately.

At the defendant's trial, the prosecutor asked the complaining witness on direct examination whether she had previously engaged in anal sexual relations with persons other than the defendant. The witness aid that she had not. When defense counsel made inquiry on cross-examination to establish a foundation for later impeachment, the trial

judge indicated that a foundation was not necessary and that he would allow the impeachment. The trial judge later reconsidered the ruling, however, and barred defense counsel from introducing, during the defendant's case in chief, testimony from a witness who would have contradicted the complainant's assertion. Before the jury began its deliberations, the judge struck the complainant's brief statement regarding her prior sexual conduct with persons other than the defendant and specifically admonished the jurors to disregard that evidence. The Stat concedes that the complaining witness' testimony was improper.

It is apparent that defense counsel's remedy was to object to the evidence, rather than attempt to impeach it. The "rape shield statute" (Ill Rev. Stat. 1987, ch. 38, par. 115-7), applicable in prosecutions for aggravated and unaggravated offenses of criminal sexual assault and criminal sexual abuse, bars the introduction of evidence concerning a victim's prior sexual conduct with persons other than the accused. The statute expresses the judgment that such evidence is irrelevant, and the statute

thus removes a potential disincentive to the prosecution of those offenses. The statute does not purport to establish an evidentiary privilege, which a witness may elect to assert or waive, but is instead phrased as a general prohibition, applicable to both the prosecution and the defense. It is therefore something of a fiction to say, as the Appellate Court did in the proceedings below, that the complainant in this case waived the protection of the statute by her testimony. (See, *e.g.*, 178 Ill.App.3d at 675, 127 Ill.Dec. 898, 533 N.E.2d 980 ("In the present case, however, the victim, by her own action at trial, rendered her past sexual activities relevant and thus admissible").) The statutory bar on such evidence is not eliminated simply because prohibited testimony already has been introduced through the complaining witness.

Although defense counsel did not make a contemporaneous objection to the prose-cutor's improper question, the trial judge subsequently granted the defendant appropriate relief. At the close of evidence, the trial judge struck the complainant's testimony concerning

her prior sexual conduct with others and instructed the jurors to disregard her statement. I agree with the majority's ultimate conclusion that the trial judge's actions were sufficient to cure any error occurring in the introduction of the evidence. In light of that result, it is appropriate to question the usefulness of the majority's detailed discussion of two additional issues, the defendant's confrontation right, and the circumstances under which evidence of prior sexual conduct would ever be admissible, and I do not join those portions of the opinion. Indeed, the court appears to recognize the hypothetical nature of its treatment of those issues when it declares, "Furthermore, even were we to conclude that it was error to exclude the rebuttal testimony if the complainant's statements were utilized by the jury in reaching a decision, we would not find error here. The jury was properly admonished to ignore the complainant's statement." 135 Ill.2d at 193, _____ Ill.Dec. at ___ 552 N.E.2d at 741.

With respect to the second question raised on appeal, I agree with the

court's conclusion that the complaining witness' social activity subsequent to the offenses charged here was a collateral matter, and that the impeaching testimony proffered by defense counsel was properly excluded on that basis. Finally, I note that in the Appellate Court the defendant raised an issue concerning his sentence, which that Court did not address in light of its decision granting the defendant a new trial. In the appellee's brief filed before this court, defense counsel correctly observed that the Appellate Court did not reach the sentencing issue. Counsel has not, however, made an alternative request for relief in the event we affirm the defendant's convictions: counsel neither presents the sentencing issue as grounds for cross-relief, nor asks that the cause be remanded to the Appellate Court for consideration of the question. Accordingly, one may conclude that the issue has been abandoned.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 29, 1990

Mr. Robert P. Will Jr.
Seven South County Street
Waukegan, IL 60085

Re: Santiago Sandoval
v. Illinois
No. 90-66

Dear Mr. Will:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

(signed) Joseph F. Spaniol, Jr., Clerk

Opinion of the
United States District Court
for the
Northern District of Illinois
No. 91 C 1532--Filed March 31, 1992

United States of America ex rel.
Santiago Sandoval,

Petitioner

v.

Gerado Acevedo, Warden of
East Moline Correctional Center, [1]

Respondent

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[1] Jerry Gilmore, Warden of the Galesburg Correctional Center, was originally named as the respondent in this action. However, the petitioner's reply brief reveals that on April 17, 1991, the petitioner was transferred to the East Moline Correctional Center in East Moline, Illinois. Accordingly, pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts, Gerado Acevedo, Warden of the East Moline facility, has been substituted as the respondent.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Petitioner Santiago Sandoval seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254. Sandoval was convicted in the Circuit Court of Lake County, Illinois on charges of criminal sexual assault and battery and sentenced to a fifteen-year prison term. The primary issue raised in this petition is whether the trial court on two occasions improperly precluded the defense from impeaching the testimony of the complaining witness regarding her sexual activity prior to and after the encounter at issue in this case, in violation of his constitutional right to a fair trial.

Relying upon the Illinois rape shield statute, Ill. Rev. Stat. ch. 38, ¶115-7(a) (1985), the court prohibited Sandoval from presenting evidence concerning the complainant's past sexual conduct with an individual other than the defendant, despite the fact that the prosecution had itself elicited testimony on this subject during direct examination. The trial court also precluded Sandoval from introducing evidence regarding the

complainant's conduct subsequent to the incident at issue in the prosecution.

Sandoval raised these claims on direct appeal from his conviction. The Illinois Appellate Court reversed Sandoval's conviction, finding that the rape shield statute's bar upon inquiry into the complainant's prior sexual history was a protection which could be waived and had been waived by the prosecution in this case.. Similarly, it reasoned that inquiry concerning the complainant' subsequent sexual activity was proper given the complainant's testimony that she had been unable to date other men since Sandoval had raped her. The Illinois Supreme Court reversed the Appellate Court's decision and affirmed the conviction, finding that the trial court acted properly in applying the rape shield statute and in precluding evidence concerning the complainant's prior and subsequent sexual activity with others.

In his habeas petition, Sandoval challenges the Illinois Supreme Court's resolution of his constitutional claims. He also raises two additional grounds for reversal of his conviction. For the

reasons set forth below, Sandoval's petition is denied.

II. FACTS

The factual summary set forth below is drawn from the evidence as summarized by the Illinois courts. See *People v Sandoval*, 135, Ill.2d 159, 142 Ill.Dec. 135, 552 N.E.2d 726 (1990); *People v Sandoval*, 178 Ill.App.3d 669, 127 Ill.Dec.898, 533 N.E.2d 980 (2d Dist.1988).[2]

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[2] 28 U.S.C. §2254(d) provides that a federal court reviewing the judgment of a state court proceedings shall presume as correct "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction ...." This provision applies to a state appellate court's summary of the evidence presented at trial. See *Sumner v Mata*, 449 U.S. 539, 547, 101 S. Ct. 764, 769 (1981). The statute goes on to identify eight circumstances which can overcome the presumption of correctness; however, Sandoval asserts none of these here. Therefore, this Court will accept the facts as they have been summarized by the Illinois Appellate and Supreme Courts. These Courts have agreed upon the essential facts of the case. However, this Court has cited and relied upon both opinions in summarizing the facts because, taken together, the two opinions supply a more complete account of the facts than either one taken alone.

Sandoval was convicted of having committed criminal sexual assault and battery upon his former girlfriend.

Sandoval met the complainant in the summer of 1986, and the two subsequently lived together for three months. The complainant moved out of the residence she had shared with Sandoval in October, 1986. According to the complainant, her relationship with Sandoval was tumultuous even before the attack at issue in this case. She testified that during the period of time in which she lived with Sandoval, he became violent when she refused sexual relations with him and that on several occasions he inflicted physical abuse upon her.

Although the complainant left the apartment she had shared with Sandoval in October of 1986, she and Sandoval resumed dating shortly thereafter. They made plans to celebrate New Year's Eve together, and their date that evening culminated in the events which underlie Sandoval's conviction. These events took place in the early morning hours of January 1, 1987. Although Sandoval's account of the evening differs from the complainant's version, he does not deny

that he engaged in repeated acts of anal intercourse and oral sex with the complainant.

The complainant gave the following account of events:

Sandoval and the complainant went to a bar in Kenosha, Wisconsin at about 10:30 p.m. on New Year's eve. While they were at the bar, Sandoval learned that the complainant had recently dated another man. Sandoval became angry and accused the complainant of having engaged in sexual relations with this other man, which the complainant denied. After awhile, Sandoval and the complainant left the bar and drove to his apartment.

At the apartment, the two discussed their relationship. Sandoval again accused the complainant of having had sexual relations with the other man she had been seeing, and he became more upset and angry as he did so. The complainant testified that she became scared and attempted to leave the apartment but that Sandoval grabbed her arm, told her that he was going to have sex with her one last time, pushed her to the floor, and positioned himself on top of her. According to the complainant, Sandoval

then pushed her into the bedroom, hit her several times on the back of the head, told her he was going to make it hurt, and forced her to engage in repeated acts of anal intercourse followed by oral sex.

The complainant testified that she begged Sandoval not to engage in anal sex with her. She stated that although she and Sandoval had had anal intercourse on two prior occasions, she had told him that she did not enjoy anal sex and that it hurt. On direct examination, the complainant also testified that she had never engaged in anal intercourse with anyone other than Sandoval.[3]

The complainant testified further that she acquiesced in the sexual activity because she believed that Sandoval might have a gun. At a point when she believed she could escape, the complain-

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[3] As discussed below, Sandoval's counsel did not object to this testimony, Rather, the defense sought to impeach the complainant's testimony by establishing that she had, in fact, engaged in anal intercourse with another individual. However, the trial court ultimately precluded the defense from eliciting evidence on this point.

ant ran upstairs to a neighbor's apartment, where she called the police and told them that she had been raped. When she knocked on the neighbor's door, she was wearing only undergarments and a skirt. She had left behind her sweater, purse and some jewelry in Sandoval's apartment.

Sandoval testified that the course of events that evening was merely a recurrence of a familiar scenario in his relationship with the complainant -- a fight_followed by sexual intercourse. He gave the following account of the night in question:

Like the complainant, Sandoval testified that they had had an argument that evening after he learned that the complainant had recently dated another man. Sandoval maintained, however, that the subsequent sexual encounter was consensual and that it had actually been initiated by the complainant.

Sandoval testified that he called a halt to the sexual encounter on this occasion because he was still upset that the complainant had been seeing another man. He said that he told the complainant that he could not trust her and that

their relationship was over. Sandoval contended that the complainant had pressed sexual charges against him because she was angry at him for rejecting her sexual advances. He testified that she had threatened him as she stormed out of his apartment.

Sandoval also testified that he and the complainant had engaged in anal intercourse on at least a dozen occasion. He stated that she had never expressed displeasure with the practice, and that she sometimes had initiated it.

The primary claim in Sandoval's habeas petition, and the focus of his state court appeal, concerns the trial court's ruling limiting his ability to elicit testimony concerning the complainant's prior sexual conduct with other persons. This issue finds its origin in the following exchange between the complainant and the Assistant State's Attorney on direct examination:

Q: Now, you had had anal sex with him before?

A: Yes.

Q: And on how many occasions had he had anal sex with you?

A: Twice.

Q: And do you recall at whose request that occurred?

A: [Sandoval's].

Q: Had you ever had anal sex in the past?

A: With others?

Q: Yes, with other people?

A: No.

(R. at 206-07.)

Sandoval did not object to this line of questioning. (See *id.*; and see R. at 513.) On cross-examination, however, his counsel sought to impeach the complainant by questioning her about another man:

> Q: Okay. Now, I guess it's in the nature of a situation like this to be a little indelicate, and for that, I apologize, but you mentioned in your testimony that when you had anal sex that night it was painful, and -- but more to the point, that this was the third time? I remember you said that this had happened on two prior occasions?
>
> A: Yes.
>
> Q: And that you told [Sandoval] that you didn't like it because it was painful?

A: Yes.

Q: Okay. And that prior to this incident with Ray, you had not had anal sex before ever?

A: Yes.

Q: Okay. Now you know what we're talking about when we say "anal sex", the act that was described here in court this morning?

A: Yes.

Q: Okay. Now, you know a fellow named --

(R. at 280.) The State objected at this juncture, and a sidebar took place. (R. at 281.) Sandoval's counsel alleged that contrary to her testimony, the complainant had in fact engaged in anal sex with the individual whom he had been about to name. Sandoval's attorney sought both to question the complainant about this individual and to offer the individual's independent testimony that he and the complainant had engaged in anal sex. (R. at 282, 284-85.) The State invoked the Illinois rape shield statute, Ill. Rev. Stat. ch. 38, ¶115-7(a) (1985)[4], and

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[4] In pertinent part, the statute provides:

In prosecutions for aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse or criminal sexual abuse, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.
Ill. Rev. Stat. ch. 38, ¶115-7(a) (1985).

argued that evidence concerning the complainant's prior sexual activity with another person was inadmissible. (R. at 281, 183, 285-86, 287.)

The trial court was initially inclined to permit the impeachment, reasoning that the State had opened the door to such evidence. (R. at 284, 286, 287, 290.) The court indicated that it was unnecessary for the defense to question the complainant about the other individual, given that she had already denied having had anal sex with anyone other than Sandoval. (R. at 284-85, 290). However, the court held that the defense would be permitted to call the individual to the stand and accomplish the impeachment through his testimony.(R. at 284-85, 290).

Subsequently, at the beginning of the defense case, the trial court thought the better of the matter and precluded the defense both from presenting the

testimony of the other individual and from cross-examining the complainant on this subject. (R. 358-62; see also R. 512-17.) Upon reflection, the court had concluded that the rape shield statute did prohibit testimony concerning the complainant's prior sexual activity with others. (R. 358-62.)[5] Sandoval himself did take the stand, and, as set forth above, he was permitted to testify that he and the complainant had engaged in anal sex on dozen occasions, that the complainant had never expressed discomfort with it, and that the complainant had, in fact, initiated anal sex on some occasions. (R. at 394-96.) In his final instructions, the court instructed the jury that "testimony of [the complainant] that she had not had anal intercourse with anyone prior to having it with Santiago Sandoval was improper and is hereby stricken. You, the jury, [are] instructed to disregard that testimony and give it no weight whatsoever in your

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[5] When the court announced its change of heart on the proposed impeachment, the defense moved for mistrial. The court denied that motion. (R. at 511.)

deliberations." (R. at 631.)

Sandoval also contends that he was improperly precluded from presenting impeaching testimony concerning her sexual activity since the rape. On cross-examination, the complainant indicated that she was undergoing counseling and that she had not dated men since the incident with Sandoval. (R. at 263.) Sandoval's counsel then proceeded to question the complainant about whether she had recently been out with another man at a certain bar. The complainant denied having been on a date. (R. at 264-65.) In an offer of proof, Sandoval's counsel indicated that he was prepared to present the testimony of another individual (the same one who would have testified as to his prior sexual relationship with the complainant) to the effect that he had seen the complainant in a bar just prior to trial "hanging all over a gentleman friend of hers." (R. 343-345.) The trial court precluded the testimony. (R. at 362.)

The jury found Sandoval guilty on two counts alleging criminal sexual assault and one count alleging battery, but acquitted him on charges of aggravat-

ed criminal sexual assault and unlawful restraint. The trial court sentenced him to the statutory maximum of fifteen years in prison.

Sandoval appealed to the Illinois Appellate Court, which, over a dissent, reversed his conviction and remanded for a new trial. The majority held that the evidence offered to impeach the complainant about her past sexual conduct had been improperly excluded. The court reasoned that because the rape shield statute was enacted for the benefit of the complaining witness, it did not prohibit the complainant from introducing evidence of her own sexual history and thereby waiving the protections of the statute. 127 Ill.Dec. 902-03, 533 N.E. 2d 984-85. Because, in this case, the State had elicited testimony from the complainant about her prior sexual history with other people, the Appellate Court concluded that the impeaching evidence proffered by the defense was relevant to the complainant's credibility and, therefore, should have been allowed:

> To interpret the statute otherwise would encourage witnesses in these circumstances to testify without regard

> for the truth, secure in the knowledge that they were insulated by the rape shield statute from confrontation with any untruths they may choose to express. A shield such as this was never meant to be created by the statute. It is precisely this result which is avoided by the language in [*People v Cornes* (1980), 80 Ill.App.3d 166, 175-76, 35 Ill.Dec. 818, 399 N.E.2d 1346] and [*People v Ellison* (1984), 123 Ill.App.3d 615, 626, 79 Ill.Dec. 37, 463 N.E.2d 175,] that the evidence to be barred by the statute is that which is not relevant to the case before the court, but is introduced anyway for the sole purpose of humiliating the victim. Where the evidence is relevant and is introduced not to harass the witness but only in a defensive response to the alleged victim's own initiative, the statute does not preclude an exception to the general protective umbrella it places over victims of sexual assault. Once a complainant decides to address her own past sexual conduct, or lack of it, she relinquishes the statutory protection and risks a challenge to the truthfulness of her version of that conduct.

127 Ill.Dec. at 902-03, 533 N.E.2d at 984-85. Observing that the relative

credibility of the complainant and the defendant was crucial to the outcome of the case, the Court concluded that the exclusion of the impeaching evidence was severely prejudicial to Sandoval. 127 Ill.Dec. at 903, 533 N.E.2d at 985. The court also found the evidence concerning the complainant's subsequent sexual conduct relevant to her credibility and concluded again that the evidence had been excluded improperly. 127 Ill.Dec. at 903, 533 N.E.2d at 985. The conviction was accordingly reversed on these two grounds. Because the case had been decided on a question of statutory construction, the constitutional claims were not addressed. 127 Ill.Dec. at 903, 533 N.E.2d at 985.

The dissent (Reinhard, J.) deemed it a violation of the rape shield statute for the State to have elicited testimony from the complainant that she had never had anal intercourse with another individual. 127 Ill.Dec. at 904, 533 N.E.2d at 986. In this context, the dissent reasoned, it lay within the discretion of the trial court whether to permit Sandoval to offer further evidence on this same subject under the doctrine of

curative admissibility or to foreclose any further inquiry into this area and instruct the jury to disregard the complainant's testimony. 127 Ill.Dec. at 904-05, 533 N.E.2d at 986-87. The dissent also perceived no error in the trial court's decision not to permit rebuttal evidence concerning the complainant's subsequent social life, finding that this was a collateral matter as to which the trial judge was justified in precluding impeachment. 127 Ill.Dec. at 905, 533 N.E 2d at 987.

Sandoval raised three additional claims before the appellate court: (1) that he was not proved guilty beyond a reasonable doubt; (2) that the verdicts of the jury were logically and legally inconsistent; and (3) that the sentence was excessive. The appellate court ruled that Sandoval had waived review of the sufficiency of the evidence and the consistency of the verdicts because he had failed to comply with Illinois Supreme Court Rule 341(e)(7) by failing to cite authorities in support of his argument.[6] 127 Ill. Dec. at 900-01, 533

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[6] In relevant part, Illinois

Supreme Court Rule 341(e) provides:

The appellant's brief shall contain the following parts in the order named:

(7) Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found. Citation of numerous authorities in support of the same point is not favored. Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.

Ill. Rev. Stat. ch. 110A, ¶341(e)(7).

N.E.2d at 982-83. As to the first of these issues, however, the court did note that if believed, the evidence introduced against Sandoval was sufficient to establish his guilt beyond a reasonable doubt. 127 Ill.Dec. at 903-04, 533 N.E.2d at 985-86.

Because it remanded the case for a new trial, the appellate court did not consider whether Sandoval's sentence was excessive. 127 Ill.Dec. at 904, 533 N.E.2d at 986.

The Illinois Supreme Court granted the State's petition for leave to appeal, reversed the opinion of the appellate

court, and affirmed Sandoval's conviction. The Supreme Court addressed two issues: (1) whether the rape shield statute's prohibition of certain kinds of evidence may be waived by the complainant; and (2) whether evidence of a rape victim's conduct subsequent to the attack is properly excluded as collateral. On the first point, the Supreme Court overruled the appellate court's interpretation of the rape shield statute and held that the statute "prohibits anyone from introducing evidence of the victim's sexual history unless it relates to the relationship between the victim and the accused." 141 Ill.Dec. at 140, 552 N.E. 2d at 731 (emphasis in original); see also 141 Ill.Dec. at 140-41, 552 N.E.2d at 731-32. Therefore, the complainant's testimony that she had not had anal intercourse with others was "clearly inadmissible" and would not have been cured by the admission of additional evidence otherwise barred by the statute. 142 Ill.Dec. at 150, 552 N.E.2d at 741. The court deemed remand unnecessary, however, because the trial court had properly instructed the jury to disregard it. 142 Ill.Dec. at 150, 552 N.E.2d at

741. The court observed that admonishments of this nature are routine and that the law presumes the jury will heed such instructions. This case, in the court's view, did not fall within one of the narrow, recognized exceptions to this presumption. 142 Ill.Dec. at 150, 552 N.E.2d at 741.

On the second issue, the Supreme Court affirmed the trial court's decision to exclude evidence about the complainant's post-rape conduct. The court noted that absent an abuse of discretion, a reviewing court will not interfere with the trial court's ruling on matters concerning the scope of cross-examination and rebuttal. The Supreme Court found no abuse of discretion in this case. 142 Ill.Dec. at 151, 552 N.E.2d at 742.

Sandoval filed a petition for a writ of *certiorari* with the United States Supreme Court, which declined to review the case. *Sandoval v. Illinois*, --- U.S.---, 111 S.Ct. 343 (1990). The State concedes that Sandoval has exhausted his state court remedies (Answer, ¶4); therefore, his petition is ripe for review by this court.

III. ANALYSIS

Sandoval raises four issues in support of his request for a writ of habeas corpus. The first three of these concern the fairness of his trial. Sandoval alleges that he was denied a fair trial: (1) he was denied the opportunity to impeach the complainant regarding her prior sexual conduct with other individuals, (2) he was denied a second opportunity to impeach the complainant as to her conduct after the rape, and (3) the State failed to prove him guilty beyond a reasonable doubt. Sandoval also asserts as a fourth argument that his sentence is excessive, cruel, and unusual in violation of the Eighth Amendment.

A. Impeachment regarding Prior Sexual History

Sandoval claims that he was denied a fair trial because his ability to impeach the complainant on the subject of her prior sexual history with other individuals was improperly limited. Sandoval argues that once the State elicited testimony from the complainant on direct examination denying that she had ever had anal intercourse with anyone but

Sandoval, he had the right to impeach her on this matter. He contends that the proffered rebuttal testimony excluded by the trial court would have achieved three things: (1) it would have impeached the complainant's assertion that she had not engaged in anal intercourse with any person other than Sandoval; (2) it would have impeached the complainant's testimony that anal intercourse was painful to her; and (3) it would have supported his theory that she consented to intercourse, in that it would have discredited one of the reasons the complainant had given for having refuse consent. Sandoval argues that when the State violated the rape shield statute by eliciting information about the complainant's prior sexual history in order to support its case, the door had been opened and the trial could not rely upon the statute to foreclose impeachment of the complainant's testimony. Sandoval further argues that the cautionary instruction directing the jury to ignore the complainant's testimony on this subject was not an adequate substitute for presenting the rebuttal evidence to the jury.

At the outset, the Court must note

the limited nature of its inquiry with respect to the state court's evidentiary rulings.

"'Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.'" *Stommer v Kolb*, 903 F.2d 1123, 1128 (7th Cir.), cert. denied, --- U.S. ---, 111 S.Ct. 305 (1990) (quoting *Smith v Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948 (1982)). Because the evidentiary rulings of a state court are primarily governed by state law, such rulings rarely constitute a proper ground for a federal court to overturn a state conviction. *Haas v Abrahamson*, 910 F.2d 384, 389 (7th Cir. 1990). "On a petition for writ of habeas corpus, a federal court will not review evidentiary questions unless 'there is a resultant denial of fundamental fairness or the denial of a specific constitutional right.'" *Stomner*, 903 F.2d at 1128 (quoting *United States ex rel. DiGiacomo v. Frazen*, 680 F.2d 515, 517 (7th Cir. 1982)).

Although Sandoval has failed to identify any particular constitutional right implicated by this aspect of his

habeas petition, his contention that he was "denied a fair trial" (see Petition at 7, §B) appears most directly to invoke "the constitutionally protected due process right to a fundamentally fair trial." See *Haas*, 910 F.2d at 389. Two other more specific constitutional rights are implicated as well. To the extent the trial court precluded further cross-examination of the complainant regarding her prior sexual activity, the Confrontation Clause of the Sixth Amendment is brought into play. The bar upon the testimony of the independent witness whom Sandoval intended to call for purposes of impeachment on this point implicates a related right -- the defendant's Sixth Amendment right to compel the presence of witnesses. A few words about the nature of each of these rights are in order before the Court proceeds further.

The Confrontation Clause of the Sixth Amendment bestows upon the criminal defendant the right "to be confronted with the witnesses against him." U. S. Const., amend. VI. This right extends to state criminal proceedings via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 1069

(1965). Among the rights guaranteed by the Confrontation Clause is the right to cross-examine the prosecution's witnesses. *Douglas v Alabama,* 380 U.S. 415, 418-19, 85 S.Ct. 1074, 1076-77 (1965). "Indeed, '[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination.'" *Delaware v Van Arsdall,* 475 U.S. 673, 678, 106 S.Ct. 1431, 1435 (1986) (emphasis deleted) (quoting *Davis v. Alaska,* 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110) (1974)).

The right to cross-examination, however, is not absolute and in appropriate circumstances must yield to accommodate other legitimate interests in the criminal trial process. *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046 (1973). The trial judge retains wide latitude to impose reasonable limits on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall* ,475 U.S. at 679, 106 S.Ct. at

1435.

It must also be kept in mind that the right to cross-examination "is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer,* 482 U.S. 730, 738, 107 S.Ct. 2658, 2663 (1987). "{T}he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985) (emphasis in original). Thus, so long as the restrictions upon cross-examination imposed by the trial judge do not disable the truth-seeking process, these limitations may be deemed consistent with the functional role of the Confrontation Clause. See *Stincer,* 482 U.S. at 739, 107 S.Ct. at 2664; *Van Arsdall,* 472 U.S. at 679, 106 S.Ct. at 1435.

In addition to the right to confront the State's witnesses against him through cross-examination, a state defendant enjoys a fundamental right, through the Sixth and Fourteenth Amendments, to

present witnesses in support of his defense. U. S. Const., amend. VI; *Chambers v Mississippi, supra.*, 410 U.S. at 302, 93 S.Ct. at 1049; *Washington v Texas,* 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1923 (1967); *United States v. Tanner,* 941 F.2d 574, 585 (7th Cir. 1991), cert. denied, No. 91-6449, 1991 WL 253523 (Feb. 24, 1992).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies.

Washington v Texas, 388 U.S. at 19, 87 S.Ct. at 1923. However, like the right of confrontation, the defendant's right to present witnesses is not unlimited:

> That right is abridged when a defendant is denied the opportunity to present at trial "a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington v Texas,* 388 U.S. at 23, 87 S.Ct. at 1925; *Roviaro v United States,* 353 U.S. 53, 63-64, 77 S.Ct. 623, 629-30, 1 L.Ed. 639

> (1957). However, no constitutional violation has occurred if the potential witness could not have provided material evidence. *United States v Verkuilen,* 690 F.2d 648, 659 (7th Cir. 1982) (citing *United States v DeStefano,* 476 F.2d 324, 330 (7th Cir. 1973)).

Tanner, 941 F.2d at 585. Thus, the relevant inquiry is whether the testimony of a witness who was excluded by the trial court "'was relevant, material, and vital to the defense, and whether the exclusion of that evidence was arbitrary.'" *Id.* (quoting *United States ex rel. Ashford v. Director, Illinois Department of Corrections,* 871 F.2d 680, 686 (7th Cir. (1989)).

Regardless of which of these three constitutional provisions is applied in this case -- the right of confrontation, the right to compel the attendance of witnesses, or the due process right to a fundamentally fair trial -- the essential inquiry is the same: Was Sandoval denied a fair trial when the trial court precluded him from eliciting evidence which arguably would have impeached the complainant's testimony regarding her prior sexual experiences? Because, as set

forth below, the excluded evidence was irrelevant to the central question of whether the complainant consented to have sex with Sandoval in the early hours of January 1, 1987, the Court finds no constitutional violation in this case.

It is unclear whether Sandoval intends to make a facial attack upon the constitutionality of the Illinois rape shield law on its face; to the extent he does, however, that challenge must fail. Because it imposes reasonable limits upon the cross-examination of complaining witnesses, the statute does not, on its face, violate a defendant's right of confront the witnesses against him and to present testimony on his own behalf. The defendant's Sixth Amendment rights do not include the right to elicit testimony on irrelevant or only marginally relevant matters. See *VanArsdall*, 472 U.S. at 680, 106 S.Ct. at 1435; *Tanner*, 941 F.2d at 585. As the Illinois Appellate Court noted in *People v Cornes*, the legislature enacted the ban upon evidence concerning the complainant's reputation for chastity and his or her history of specific acts of sexual conduct with third persons in cases of

rape and deviate sexual assault because such evidence is irrelevant to the central issue of consent. 80 Ill.App. 3d 166, 35 Ill.Dec. 818, 824-25, 399 N.E.2d 1346, 1352-57 (5th Dist. 1980). Accord *People v Ellison,* 123, Ill.App.3d 614, 79 Ill. Dec. 37, 45-46, 463 N.E.2d 175, 183-84 (2d Dist. 1984); *People v Buford,* 110 Ill. App.3d 46, 65 Ill.Dec. 721, 726, 441 N.E. 2d 1235, 1240 (1st Dist. 1982). See *Sandoval,* 142 Ill.Dec. at 140, 552 N.E.2d at 731. In this respect, the statute is consistent with the Confrontation Clauses' functional role of "promoting reliability in a criminal trial," because it excludes evidence which might improperly influence a jury, see *Stincer,* 482 U.S. at 739, 107 S.Ct. at 2264, which might cloud the issues, or which might harass or cause undue prejudice to the complaining witness, see *VanArsdall,* 475 U.S. at 679, 106 S.Ct. at 1435.

Recognizing the propriety and reasonableness of excluding evidence which has little or no bearing upon the real issues at stake in a rape trial, a number of federal courts have upheld the application of rape shield statutes

against constitutional challenge. See e.g., United *States v Torres*, 937, F.2d 1469, 1473-74 (9th Cir. 1991), cert. denied, --- U.S. ---, 112 S.Ct. 886 (1992); *Jeffries v Nix*, 912 F.2d 982 (8th Cir. 1990), cert. denied, --- U.S. ---, 111 S.Ct. 1327 (1991); *Bell v Harrison*, 670 F.2d 656 (6th Cir. 1982); *Doe v United States*, 666 F.2d 43, 47 (4th Cir. 1981). Like the Illinois Appellate Court, these courts have emphasized that evidence of the complainant's past sexual behavior with others or reputation for chastity is not a relevant indicator of either the likelihood of the complainant's consent to a specific act or her veracity and that the accused is not constitutionally entitled to present irrelevant evidence. See *Jeffries*, 912 F. 2d at 986; *Doe*, 666 F.2d at 47. See also *United States v Kasto*, 584 F.2d 268, 271-272 (8th Cir. 1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1267 (1979).

Courts nevertheless recognize that in some circumstances, evidence of the complainant's prior sexual conduct may be relevant and admissible -- for instance, (1) where the evidence explains a physi-

cal fact in evidence at trial, such as the presence of semen, pregnancy, or another physical condition in the complainant which indicates intercourse, (2) where the evidence tends to establish bias, prejudice, or an ulterior motive underlying the rape charge, or (3) where the complainant has engaged in a prior pattern of behavior clearly similar to the conduct involved in the case on trial. See *Kasto*, 584 F.2d 271 n.2; *United States ex rel. Fuller V. Attorney General of Illinois*, 589 F. Supp. 206, 210 (N.D. Ill. 1984) (Aspen, J.), aff'd mem., 762 F.2d 1016 (7th Cir. 1985). See also *Olden v Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 483-84 (1988). In some instances, evidence concerning the complainant's past sexual experiences might also be admissible to show the accused's state of mind. See *Doe*, 666 F.2d at 48; *Fuller*, 589 F.Supp. at 210.

Here, Sandoval argues that the complainant's prior sexual became relevant when she asserted on direct examination that she found anal intercourse to be painful and that she had never engaged in this activity with others. Because she gave this testimony in the context of

explaining why she did not consent to having anal intercourse with Sandoval on the night in question, Sandoval argues that the evidence he proffered was not collateral and that his inability to present that evidence prevented him from impeaching her credibility on the critical question of consent.

In order to decide whether the trial court's decision to preclude further testimony on this matter rose to the level of a Sixth Amendment violation, this Court is obliged not to focus solely upon the particular inquiry which the trial court disallowed, but rather to review the entire evidentiary record:

> *Davis v. Alaska, supra,* 415 U.S. 308, 94 S.Ct. 1105,] does not require a reviewing court to isolate the particular limitation on cross-examination. Rather, "the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony." *United States v Rogers,* 475 F.2d 821, 827 (7th Cir. 1973), quoting *Fountain v. United States,* 384 F.2d 624, 628 (5th Cir. 1967), cert. denied, 390 U.S. 1005, 88 s. Ct. 1246,

> 20-L. Ed. 105 (1968). To answer that question the court must look to the record as a whole, *Rogers*, 475 F.2d at 827, and to the alternative means open to the defendant to impeach the witness, *United States v. Brown*, 634 F.2d 819, 825 (5th Cir. 1981). See also *Chambers*, 410 U.S. at 298, 93 S.Ct. at 1047. The court must ultimately decide whether the probative value of the [excluded evidence] was such that the defendant's right to effective cross-examination was substantially diminished.

United States ex rel. Blackwell v. Franzen, 688 F.2d 496, 500-01 (7th Cir. 1982), cert. denied, 460 U.S. 1072, 103 S.Ct. 1529 (1983). See also *United States v. Moore*, 936 F.2d 1508, 1518 (7th Cir.), cert. denied, --- U.S. ---, 112 S.Ct. 607 (1991).

In this case, the trial court precluded evidence regarding the complainant's sexual history with a third person because it would confuse and distract the jury. The court explained, "The issue before this jury is what occurred on January 1, 1987, and we would really be throwing this jury off those facts." (R. at 359) Although troubled by the fact that the State itself had ventured into

the complainant's prior sexual history, the trial court reasoned that permitting the rebuttal testimony proposed by the defendant would result in a collateral inquiry into the complainant's reputation for chastity. That kind of inquiry, the court observed, had been foreclosed not just by the legislature, "but the Court for years prior to the [rape] shield has said you can't march anybody before a jury to indicate that type of activity." (R. at 359.)

Looking to the record as a whole, Sandoval's right to effective cross-examination was not violated, because he was able to challenge the complainant's testimony and to present his defense to the jury despite the limitation imposed by the trial court. Sandoval's testimony directly contradicted complainant's on important points, and clearly laid out his theory of the case -- that he had been falsely accused by a scorned woman. The trial court permitted the defense to elicit testimony from Sandoval in support of this theory. For example, Sandoval was permitted to testify on direct examination over the State's objection that he and the complainant had engaged

in anal intercourse "a dozen times," that complainant did not express any displeasure with the practice, and that she had initiated anal intercourse with Sandoval in the past. (R. at 394-96.) Indeed, Sandoval testified that on the night of the alleged attack, the complainant, not he, had initiated anal intercourse. (R. at 437.) It is evident, therefore, that the trial court afforded the defense sufficient latitude to rebut the complainant's testimony through Sandoval.

None of the arguments which Sandoval articulates would have rendered further cross-examination of the complainant, or the presentation of another witness to testify about the complainant's sexual relationship with him, admissible. Sandoval contends first that the testimony would have impeached the complainant's assertion that she had never had anal intercourse with anyone other than Sandoval. However, that point in and of itself did not render the evidence relevant. Testimony which merely impeaches a witness on a given point is not admissible on that ground alone; rather, the impeachment must be on a relevant issue. See *United States v. Jarrett*, 705 F.2d

198, 207 (7th Cir. 1983), cert. denied, 465 U.S. 1004, 104 S.Ct. 995 (1984). Standing alone, evidence regarding the complainant's prior sexual conduct with a person other than Sandoval was not relevant to determine what happened between Sandoval and the complainant or to assess the complainant's credibility on the specific question of her consent at the time of the incident.

Sandoval argues next that the evidence was relevant to rebut the complainant's testimony that she found anal intercourse to be painful. Again, the impeachment must be relevant; this impeachment was not. Even if one assumes that the complainant had initiated and enjoyed this practice with another individual (as Sandoval's witness presumably would have testified), this testimony would have not have directly rebutted the complainant's assertion that she found the act painful when performed with the petitioner. As the Illinois Supreme Court observed:

> Mere absence of pain during or even enjoyment of particular sexual practices with certain individuals does not equate to absence of pain or enjoyment of the particular practice in all

> circumstances; nor, we note, does it have any bearing on the issue of consent. A act performed with gentleness on one occasion may be quite different than that same act performed with anger, hostility, or vehemence. Thus, even had the complainant initiated anal intercourse with others in the past, we fail to see its relevance to the charges levied against Sandoval.

142 Ill.Dec. at 146, 552 N.E.2d at 737. Consequently, the disallowed testimony is most properly viewed as collateral evidence properly excluded.

Finally, Sandoval argues that the testimony would have supported his theory that the complainant consented to engage in anal intercourse with him because it would have contradicted one of the reasons she offered for having purportedly refused consent. But Sandoval misconstrues the complainant's testimony. The complainant testified that she believed Sandoval chose the particular method of rape because he knew anal intercourse was painful for her. (R. at 206.) That is, the complainant's theory was that it was the prospect of pain which motivated Sandoval to choose anal intercourse as the means of rape:

BY MS. GOODSTEIN (for the State):

Q After he told you to roll over, what, if anything, did you do?

A. When he told me to roll over I knew what he meant is that he wanted to have anal sex.

MR. KEEFE (for the defense): Objection to what she knew, Judge.

THE COURT: Sustained. The jury is instructed to disregard the last comment, please.

Q When he said "roll over", what, if anything, did you do?

A I got down on my knees and started begging him and asking him not to do it that way because it hurt because I had told him before that it hurt.

Q Now now-- you say "not to do it that way", what did you think he was going to do?
A I thought he wanted to have anal sex.

Q And, why did you think that he wanted to have anal sex?

A Because in the past he had wanted to have anal sex, and I told him before that it hurt, that it hurt really bad, and I don't like doing it that way, and that he was doing it this time because he knew it hurt, and he wanted to hurt -- it to hurt.

(R. at 205-06.) Whether the complainant had engaged in and enjoyed anal inter-

course with another individual has no bearing upon this theory. Moreover, viewed as a whole, the complainant's testimony indicated that she would not have consented to any type of intercourse with Sandoval. (See R. at 182, 190-91, 192, 195, 201, 211, 217-18, 227-28, 274-76.)

In sum, the latitude given the defense to permit Sandoval to contradict the complainant's testimony and the collateral nature of any further evidence regarding her sexual experience with other individuals reveal that Sandoval was not unduly prejudiced by the Court's exclusion of this additional evidence.

The doctrine of curative admissibility does not compel a different conclusion.

> The doctrine of curative admissibility allows a trial judge, in his discretion, to order to rebut prejudicial evidence which has already been erroneously admitted. The doctrine applies, therefore, only when inadmissible evidence has been allowed, when that evidence was prejudicial, and when the proffered testimony would counter that prejudice.

United States v Nardi, 633 F.2d 972, 977 (1st

Cir. 1980) (citations omitted). See also *United States v. Bolin*, 514 F.2d 554, 558-59 (7th Cir. 1975). Without naming it, Sandoval effectively relies upon this doctrine in arguing that otherwise inadmissible testimony regarding the complainant's prior sexual conduct with other individuals should have been admitted in order to counter the prejudice which resulted from the complainant's assertion that she had engaged in anal intercourse with no one but Sandoval. However, this doctrine cannot be converted into a license to produce irrelevant evidence in all instances in which a door has been opened.

> As noted in *United States v McClain*, 142 U.S. App. D.C. 213, 216, 440 F.2d 241, 244 (1971): "The doctrine of curative admissibility is one dangerously prone to overuse." Permission to explore in rebuttal with testimony not admissible on direct, on the ground that the other party has opened the doors, rests "upon the necessity of removing prejudice in the interest of fairness." *Crawford v. United States*, 91 U.S. App. D.C. 234, 237, 198 F.2d 976, 979 (1952).

United States v. Winston, 447 F.2d 1236, 1241

(D.C. Cir. 1971) (footnote omitted).

Admission of another witness' testimony regarding the complainant's purported history of anal intercourse with him was not required in order to cure whatever prejudice which inured to Sandoval as the result of the complainant-'s testimony on direct examination.

Sandoval did not, in the first instance, voice an objection when the State, in plain violation of the rape shield statute, asked the complainant whether she had ever had anal intercourse with others.[7] When the State attempts a foray into matters which are clearly inadmissible, the defense may not sit idly by and expect that the trial court will permit the error to be compounded later on with the introduction of even more inadmissible evidence on a *quid pro quo* basis; it is, rather, the duty of the defendant to object and to do so promptly. As the Fifth Court has observed, "the objection is not merely to preserve

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[7] The State has conceded that this inquiry was improper. See 142 Ill.Dec. at 151, 552 N.E.2d at 742 (Miller, J. concurring).

a point for appellate review but also to give the court and opposing counsel an opportunity to correct errors at the time while they are still correctable." *United States v. Scaglione*, 446 F.2d 182, 188 (5th Cir. 1971); accord *United States v Vasen*, 222 F.2d 3, 5 (7th Cir.), cert. denied, 350 U.S. 834, 76 S.Ct. 70 (1955). See *Winston*, 447 F.2d at 1240 (purpose of curative admissibility doctrine is to "prevent prejudice and is not to be subverted into a rule for injection of prejudice"); accord *United States v Johnson*, 502 F.2d 1373,1376 (7th Cir. 1974), cert. denied, 420 U.S. 977, 95 S.Ct. 1402 (1975). See also *Sandoval*, 142 Ill.Dec. at 151, 552 N.E.2d at 742 (Miller, J. concurring); 127 Ill. Dec. at 904-05, 533 N.E.2d at 986-87 (Reinhard, J. dissenting). Had Sandoval's counsel objected at the outset to inquiry regarding the complainant's past sexual experiences, the trial court might well have foreclosed the problem before it started.

In any case, the trial court ultimately did cure any unfairness which might have resulted to Sandoval in precluding the additional evidence he

wished to offer on this point. The court explained to the jury that the evidence elicited by the State was improper and had been stricken and instructed the jury to disregard it. As the State has argued, there is a strong presumption that the jury follows such instructions. *Richardson v Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 1707 (1987); *Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078, 2082 (1985). Further, as the Supreme Court noted in *Bruton v. United States,* "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. A defendant is entitled to a fair trial but not a perfect one." 391 U.S. 123, 135, 88 S. Ct. 1620, 1627 (1968).

At the same time, the trial court permitted Sandoval to rebut the complainant's testimony to the extent of testifying that he and the complainant had engaged in anal intercourse on more than the two occasions she recalled, that she enjoyed it, and that she had, in

fact, initiated the sexual encounter on the night in question. To have permitted the defense to venture beyond the sexual relationship between Sandoval and the complainant would have only compounded the prejudice and would, as explained above, have introduced evidence which had no relevance whatsoever to what occurred between Sandoval and the complainant. See *Winston*, 447 F.2d at 1240 ("Introduction of otherwise inadmissible evidence under shield of [the curative admissibility] doctrine is permitted 'only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.'") (quoting *California Ins. Co. v Allen*, 235 F.2d 178, 180 (5th Cir. 1956)).

For all of these reasons, the Court concludes that there was no error of constitutional dimension in the trial court's decision not to permit defense inquiry into the complainant's prior sexual history with a person other than the defendant. The trial court's ruling was far from being arbitrary or unduly prejudicial to the defendant, and merely excluded evidence which had no real relevance to the issues properly before

the jury.

B. Impeachment Regarding the Complainant's Subsequent Activities

Sandoval contends that he was denied a fair trial because he was prohibited from presenting independent testimony regarding the complainant's social conduct after the attack. The following exchange on cross-examination gave rise to this issue:

> BY MR. KEEFE (for the defendant):
>
> Q Has there been any counseling -- have you got into any counseling since this incident happened?
>
> A Yes,
>
> Q Okay. Can you described it specifically?
>
> A Yes. I was going to counseling at the Lake County Crisis Center --
>
> Q Okay.
>
> A. -- for a period of time, and also I joined up with La Casa, which is a rape place -- a place for rape victims.
>
> Q Okay. Can you tell the jury how this has affected your life since the incident hap-

pened? Has it -- has it changed your relationship with me, for example?

A I haven't dated anyone?

Q You haven't dated anyone?

A No, not since then.

Q Okay. Is that because you don't trust men generally right now?

MS GOODSTEIN (for the State): Judge, this is beyond the scope.

THE COURT: Sustained, because it's -- not for the reason that you mentioned, though.

Next question.

BY MR. KEEFE:

Q Were you out with a man on February 27th?

MS. GOODSTEIN: Objection.

THE COURT: Overruled.

MS. GOODSTEIN: Judge, if we can approach the bench?

THE COURT: Overruled.

BY MR. KEEFE:

Q At Annie's Bar (phonetic) in Mundelein?

A At what bar?

Q Annie's Bar in Mundelein about four o'clock in the morning on the 27th? That would be late last Thursday night or Friday morning.

A I don't --

MS. GOODSTEIN: Judge, this occurred January 1st. We would ask the Court to sustain our objection.

THE COURT: Overruled.

THE WITNESS: I don't recall any Annie's Bar.

BY MR. KEEFE:

Q Well, do you recall being in a tavern in Mundelein about four o'clock in the morning in the company of a date?

A No, I haven't been on a date.

(R. at 263-65.) According to Sandoval, the complainant perjured herself when she testified upon cross-examination that as a result of the sexual assault she had been unable to date any me. As set forth above, Sandoval sought to contradict this testimony by calling to the stand a witness who would testify that he had seen the complainant "hanging all over a

gentleman friend of hers at a bar" at 4:00 a.m. well after the assault took place and just prior to the start of trial. Sandoval again emphasizes that the trial came down to a credibility contest between the complainant and himself, and argues that in this context the witness was relevant and material to the complainant's believability. Sandoval maintains that when the trial court excluded this witness, he was denied an important opportunity to impeach the complainant.[8]

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[8] Sandoval captions this aspect of his petition as a challenge to a limitation upon cross-examination of the complainant. (See Petition at 8, §C.) However, the record does not reveal any restriction upon cross-examination. Indeed, as the petition itself reveals, the defense did ask the complainant whether she had recently been out on a date at "Annie's Bar" in Mundelein, Illinois; the complainant denied being out on a date and said "I don't recall any Annie's Bar." (*Id.* R. at 264-65.) Thus, the defense was permitted full inquiry of the complainant on this subject. The real question here is whether it was proper to require Sandoval to live with the answers he got from the complainant, or whether he should have been permitted to present another witness who presumably would have contradicted these answers.

Like the previous issue, this one presents an evidentiary question which requires the Court to grant the habeas petition only if the trial court committed a prejudicial error of constitutional dimension. See *Haas v. Abrahamson, supra,* 910 F.2d at 389; *Somner v Kolb, supra,* 903 F.2d at 1128. At stake in this instance are, once again, the due process right to a fundamentally fair trial, see *Haas,* 910 F.2d at 389, and the defendant's Sixth Amendment right to present witnesses in support of his defense, see *Tanner,* 941 F.2d at 584-85. Because, as set forth below, the subject of the complainant's social activities following the assault had no relevance whatsoever to the charges against Sandoval, there was no fundamental unfairness to Sandoval in excluding the witness who would have testified on this subject.

The testimony which Sandoval sought to impeach was elicited upon cross-examination of the complainant. The effect of the assault upon the complainant's social life was not, therefore, a matter which the State had raised in order to support its theory of the case or in order to

elicit sympathy for the complainant. Instead, the record reveals unequivocally that the defense purposefully broached this subject and elicited the complainant's statement that she had been unable to date men since the incident, perhaps doing so with the sole intent of laying the groundwork for impeachment. Thus, to the extent Sandoval claims to have been put at a disadvantage by the witness' answer, it is not one which he can attribute to the prosecution.

At the same time, over the repeated objections of the State, the defense was given latitude by the trial court to ask the complainant whether she had recently patronized a local bar on a date with another man. Thus, the defense was given the opportunity to attempt to impeach the complainant's testimony through further cross-examination. The trial court drew the line only so as to preclude extrinsic evidence on this subject.

Finally, and most importantly, the trial court acted well within its discretion in precluding the independent testimony of another witness regarding the complainant's subsequent social life. Although the trial court did not elabo-

rate its reasons for excluding this evidence (see R. at 362), Sandoval has assumed that the court did so on the grounds of relevance, and this Court assumes the same. Whether the complainant felt able to date other men after the rape, and whether she had in fact been seen in the company of a man at a bar shortly before the trial began, had absolutely no bearing upon the charges in the case.[9] Therefore, to have permitted extrinsic evidence on this point would only have served to compound the unwarranted foray into the complainant's personal life which the defense itself had initiated on cross-examination. See

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[9] In the briefing before this Court, Sandoval has articulated no reason why this topic had any legitimate bearing upon the case. His sole argument is that once the complainant denied being able to date men since the attack, the defense was free to introduce evidence to the contrary (See Petition at 8, §C; Reply at 11-12.) Similarly, the Illinois Appellate Court, in concluding that the rebuttal evidence should have been permitted, noted only that the evidence was relevant to her credibility and did not cite any substantive relevance which the evidence bore to the charges in the case. 127 Ill.Dec. at 903, 533 N.E.2d at 985.

United States v. Rovetuso, 768 F.2d 809, 817 (7th Cir. 1985) (extrinsic evidence offered to impeach witness on collateral matters elicited upon cross-examination not permitted), cert. denied, 476 U.S. 1106, 106 S.Ct. 1951 (1986).

As noted above, the defendant's Sixth Amendment right to present the testimony of a witness on his behalf is not unlimited; rather, the witness must offer testimony which is relevant and material to the defense. *Tanner,* 941 F.2d 1372, 1375 (7th Cir. 1990); *United States v Jarrett, supra* 705 F.2d at 207.

In this case, the probative value of the extrinsic evidence concerning the complainant's social life was slight, while its potential to confuse and distract the jury was substantial. The evidence was plainly inadmissible on any ground other than its potential to contradict the complainant's testimony on cross-examination. The purported sighting of the complainant at a local bar was months after the events at issue in the case, and it shed no light upon what happened between Sandoval and the complainant. Testimony that the complainant

had been seen "hanging all over a gentleman friend of hers," even if offered in good faith, certainly carries with it the potential of suggesting to the jury that the complainant was a libertine woman deserving of egregious treatment. Such outdated notions are exactly the kind which the rape shield laws have sought to remove from the courtroom in precluding evidence concerning a complainant's prior sexual history with others or her reputation for chastity. See *Cornes*, 35 Ill. Dec. at 823, 824-25, 399 N.E.2d at 1351, 1352-53. Moreover, the testimony which the defense proffered might well have required further testimony from the complainant as to the circumstances of what the defense witness purportedly had seen, resulting in a mini-trial on a minor point completely collateral to the charges in the case. The trial court therefore acted prudently in excluding the evidence.

C. Sufficiency of the Evidence

Sandoval contends that he was denied a fair trial because the State failed to prove him guilty beyond a reasonable doubt. In his view, the "case boils down to a credibility contest between the only

two people in the world who really know what happened" on January 1, 1987. Sandoval argues that the complainant was an inherently unbelievable witness and lists nine examples of purportedly inconsistent testimony on her part to support his contention. (Petition at 6-7.) Because the State's primary witness was not credible, Sandoval argues, the State failed to meet its obligation to prove him guilty beyond a reasonable doubt.

As noted above, the Illinois Appellate Court found that this claim had been waived on appeal because, contrary to Illinois Supreme Court Rule 341(e)(7), Sandoval failed to cite authorities in support of his contention in his appellate brief. *People v. Sandoval*, 127 Ill.Dec. at 900, 533 N.E.2d at 982 ("While defendant does argue facts he considers relate to the reasonable doubt question, he offers no supporting authority."). Even so, the court considered the sufficiency of the evidence at the conclusion of its opinion:

> Although we consider the issue to have been waived, defendant has argued that he was not proved guilty beyond a

> reasonable doubt. Mindful of the directive in *People v Taylor* (1979)[10], 76 Ill.2d 289, 29 Ill. Dec. 103, 391 N.E.2d 366, we have examined the evidence introduced against defendant and find that, if believed by the jury, it was sufficient to show beyond a reasonable doubt that he was guilty of criminal sexual assault as charged, as well as the lesser-included offense of battery. Our finding raises no inference as to defendant's guilt or innocence which would be binding on retrial, but is meant only to protect him from the risk of being subjected to double jeopardy.

127 Ill.Dec. at 903-04, 533 N.E.2d at

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[10] In *Taylor*, the Illinois Supreme Court held that it was error for the Appellate Court to reverse the defendant's conviction and remand for a new trial without considering whether the evidence presented at the first trial was sufficient to sustain the defendant's conviction:

> When an appellate court reverses a criminal conviction and remands the case for a new trial without deciding defendant's contention that the evidence at the first trial was insufficient, we believe that the court risks subjecting the defendant to double jeopardy.

29 Ill.Dec. at 112, 391 N.E.2d at 375.

985-86.

In deference to concerns of federalism and comity, a federal court normally may not review the decision of a state court rejecting the habeas petitioner's constitutional claim if that decision rests upon adequate and independent state grounds. *Coleman v. Thompson,* --- U.S. ---, 111 S.Ct. 2546, 2553-54 (1991); *Wainwright v Sykes,* 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503, 2506 (1977). In particular, where the petitioner has defaulted his federal claim in state court under an independent and adequate state procedural rule, the federal habeas court is precluded from reviewing that claim unless the petitioner succeeds in showing either cause for the default and actual prejudice which results from the purported violation of federal law or that a fundamental miscarriage of justice will result absent federal review of his claim. *Coleman,* 111 S.Ct. at 2565.

In view of the appellate court's finding that Sandoval's argument as to the sufficiency of the evidence had been waived for failure to comply with Rule 341(e)(7), this Court is precluded from

considering the merits of Sandoval's argument. The Illinois Appellate Court's resolution of Sandoval's sufficiency argument plainly hinges upon Rule 341(e)(7); therefore, its decision rests upon an adequate and independent state ground. The concerns underlying Rule 341(e)(7) are easily recognized and time-honored:

> The well-established rule is that mere contentions, without argument or citation of authority, do not merit consideration on appeal. (*Fuller v Justice* (1983), 117 Ill.App.3d 933, 73 Ill.Dec. 144, 453 N.E.2d 1133.) Contentions supported by some argument but by absolutely no authority do not meet the requirements of Supreme Court Rule 341(e)(7). (*In re Marriage of Drummond,* (1987), 156 Ill.App.3d 672, 109 Ill.Dec. 46, 509 N.E.2d 707.) A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research. *Holliday v. Civil Service Comm'n* (1984), 121 Ill.App.3d 763, 77 Ill.Dec. 302, 460 N.E.2d 358.

People v. Hood, 210 Ill.App.3d 743, 155 Ill. Dec. 228, 230, 569 N.E.2d 228, 230 (4th Dist. 1991). Sandoval argues that he did

comply with Rule 341(e)(7) by supplying a statutory citation in his reply brief and by making extensive argument on this issue, albeit without supporting citations, in his original brief. (Reply Mem. at 2.) Of course, this Court is not free to review the State Court's finding as to compliance with Rule 341(e)(7). See *Coleman*, 11 S.Ct. at 2554. It bears noting, however, that citations belatedly supplied in the appellant's reply brief do not save an argument from a finding of waiver under Rule 341(e)(7). *Kawasaki Shop of Aurora, Inc. v. Kawasaki Motors Corp., U.S.A.*, 188 Ill App.3d 664, 136 Ill.Dec. 4, 9, 544 N.E.2d 457, 462 (2d Dist. 1989). Finally, the Court notes that at least two of its colleagues in the Northern District of Illinois have held federal review of habeas claims barred by State Appellate Court findings that the petitioner had failed to provide citations to authority as required by Rule 341(e)(7). See *United States ex rel. James V. O'Leary*, No. 89 C 7916, 1990 WL 84522, at *7 (N.D. Ill. June 14, 1990) (Kocoras, J.); *United States ex rel. Lewis v. Chrans*, No. 84 C 7779, 1985 WL 1758, at *7

(N.D. Ill. June 14, 1985) (Holderman, J.). Compare *United States ex rel. Johnston v. Gramley*, No. 85 C 4166, 1985 WL 2354, at *2 (N.D. Ill. Aug. 21, 1985) Getzendanner, J.) (although failure to supply record citations to Illinois Appeliate Court constituted technical violation of Rule 341(e)(7), it was appropriate for federal court to reach merits of claim where state court's opinion did likewise "without once alluding to waiver"), judgment aff'd mem., 792 F.2d 42 (7th Cir. 1986).

Sandoval has not attempted either to demonstrate cause and prejudice which would constitute grounds for overlooking his default or to explain why a fundamental miscarriage of justice will result if this Court does not reach the merits of his sufficiency claim. (See Reply Mem. at 2) Accordingly, this is not a case in which the Court may step over the barrier to review of constitutional claims which have been denied on the basis of an adequate and independent state ground.

Even if the Court were to reach the merits of Sandoval's claim, it would surely fail. The burden upon Sandoval in challenging the sufficiency of the

evidence is a heavy one; he must show that the record below is devoid of any evidence from which "any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." *Jackson v. Thompson*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Of course, the Court is obligated to review that record in a light most favorable to the prosecution at this juncture. See *Tanner*, 941 F.2d at 586; *United States v. Fozo*, 904 F.2d 1166, 1169 (7th Cir. 1990). Sandoval's claim as to the sufficiency of the evidence rests solely upon the notion that the complainant was an unbelievable witness whose testimony was riddled with inconsistencies. (See Petition at 5-7.) Yet, as the State argues, matter of the credibility are within the province of the jury to resolve; thus, Sandoval's attack upon complainant's credibility do not supply an adequate ground upon which to grant a writ of habeas corpus. See *Marshall v. Lonberger*, 459 U.S. 422, 434-35, 103 S.Ct. 843, 851 (1983) ("Title 28 U.S.C. §2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been

observed by the state trial court, but not by them."); *United States ex rel. Austin v. Peters,* No. 89 C 2304, 1990 WL 1139272, at *8 (N.D. Ill. Sept. 17, 1990) (Rovner, J.); *United States ex rel. McCord v. Fairman,* No. 88 C 8761, 1990 WL 17128, at *3 (N.D. Ill. Feb. 6, 1990) (Rovner, J.).

D. **Excessiveness of the Sentence**

Finally, Sandoval maintains that the trial court imposed a sentence which was excessive, cruel, and unusual in violation of the Eighth Amendment when it sentenced him to the statutory maximum of fifteen years. Sandoval argues that the court imposed this sentence because "he fell within the Trial Judge's category of disfavored offenders." (Petition at 9.) He further argues that the Court "arbitrarily refused to consider mitigating factors and the long-range potential for rehabilitation." *(Id.)* Among the factors which Sandoval suggests the trial court should have considered are his lack of a prior criminal record, his marriage and two and one-half year-old son, his employment record, his charity work in

the community, and his education. (See *id.*)

In his opinion concurring in the Illinois Supreme Court's affirmance of Sandoval's conviction, Justice Miller observed that Sandoval had failed to ask the Supreme Court to review his sentence in the event the Court affirmed his conviction, and had, therefore, abandoned this claim. 142 Ill.Dec. at 152, 552 N.E.2d at 743. The State makes the same argument now, contending that because he did not ask the Illinois Supreme Court to entertain this issue, Sandoval has waived it for purposes of habeas review. Cf. *Nutall v. Greer*, 764 F.2d 462, 463 (7th Cir. 1985) (failure to seek review of claim via petition for leave to appeal to Illinois Supreme Court bars federal habeas review). There is no dispute that although he did raise this issue before the Illinois Appellate Court, Sandoval did not ask the Illinois Supreme Court to address it.

Even assuming this claim has been preserved for federal review, the Court perceives no merit in the issue. The Eighth Amendment requires the sentencing court to consider mitigating circumstanc-

es only in capital cases. See *United States ex rel. Rivera v. Lane,* No. 90 C 1474, 1990 WL 133500, at *4 (N.D. Ill. Sept. 11, 1990) (Kocoras, J.) (rejecting Eighth Amendment attach on mandatory life sentence), judgment aff'd mem., No. 90-3387, --- F.2d--- (7th Cir. Mar. 5, 1992), and *United States ex rel. Durham v. O'Leary,* 685 F. Supp. 1051, 1055 (N.D. Ill. 1988) (Aspen, J.) (same), each citing *Solem v. Helm,* 463 U.S. 277, 289, 103 S.Ct. 3001, 3009 (1983). Further, as the Court noted in *United States ex rel. Moore v. Thieret,* No. 86 C 5099, 1988 WL 64251, at *1 (N.D. Ill. June 17, 1988) (Marshall, J.), judgment aff'd mem., 878 F.2d 384 (1989), "Whether the sentencing judge gave proper weight to the absence of a prior record or the absence of aggravating circumstances is not a question for this court." Rather, the sole questions which the Court may properly consider is whether the sentence imposed is grossly disproportionate to the severity of the offense. *Id.* In this case, the length of the prison term imposed upon Sandoval is within the range prescribed by the Illinois legislature. Accordingly, the propriety of the term

imposed in this case is not subject to review by this Court. See *United States ex rel. Smith v. O'Leary*, No. 85 C 7217, 1985 WL 3023, at *1 (N.D. Ill. Oct. 10. 1985) (Nordberg, J.) ("The length of a sentence imposed for commission of a felony offense is not subject to review under the proportionality principle of the Eighth Amendment so long as the law of the sentencing jurisdiction authorizes the term imposed."); *United States ex rel. Jackson v. McDonald*, No. 83 C 6009, 1984 WL 1396, at *3 (N.D. Ill. Dec. 24, 1984) (Moran, J.) (same; rejecting Eighth Amendment challenge to imposition of 30-year maximum term in rape case).

IV. CONCLUSION

For all of the reasons set forth above, Sandoval's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is denied.

ENTER:

(Signed): ILANA DIAMOND ROVNER
UNITED STATES DISTRICT JUDGE

Dated: March 31, 1992

Opinion of the
United States Court of Appeals

For the Seventh Circuit

No.92-2089--Filed May 20, 1993

Santiago Sandoval,

Petitioner-Appellant,

v.

Gerado Acevedo, Warden of East Moline Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 91 C 1352- Ilana Diamond Rovner, Judge

Argued January 26, 1993

Before Posner and Ripple, *Circuit Judges*, and Fairchild, *Senior Circuit Judge*. Posner, *Circuit Judge*.

Santiago Sandoval was convicted by a jury in an Illinois State Court of

criminal sexual assault and was sentenced to 15 years in prison, the maximum punishment. After exhausting his state remedies he sought habeas corpus in a federal district court, lost, and appeals.

The only direct evidence of Sandoval's guilt was the testimony of his victim (whom we shall call "S___" to protect her privacy), which we summarize: She was a divorced woman of 20 when she first met him, he a 27-year-old man who had been born in Panama, was divorced, and was working as a power lineman for Commonwealth Edison at a salary of $600 a week. After living together for several months they broke up because he would become violent and hit her when she refused his demands for sexual intercourse.They reconciled to the extent of resuming dating and wee having a fine time at a night spot on New Year's Eve when Sandoval became jealous upon being told by the disc jockey that S___ had been seen with another man. Sandoval calmed down and S___ agreed to accompany him to his apartment to discuss their relationship. He again became angry, accused her of having slept with the

other man, and finally announced "that he was going to fuck [her] one last time." She resisted, but he dragged her on her back to the bedroom and then ordered her to roll over. Realizing that he meant to force her to submit to anal intercourse, she begged him not to have intercourse with her that way because they had had anal sex twice before and it had hurt her very badly. After forcibly sodomizing her, he compelled her to perform fellatio on him.

She fled, partially clothed, pounded on the first apartment door that she came to, and told the occupant in a manner that he described as "between anxious and hysterical" that she had been raped. He let her in, and she then called the police. This part of her testimony was corroborated by the occupant, and by the police officers who responded to her call and arrested Sandoval. The police also testified that she had bruises on her face.

Sandoval testified that while they were living together he and S____ had had anal intercourse frequently, that she had enjoyed it and even on occasion had initiated it. When, at the nightclub on

New Year's Eve, he accused her of having been with another man, she tearfully confessed, and at his apartment afterward had initiated anal and oral sex with him. But he could not get over her betrayal of him with the other man and eventually ordered her to leave the apartment. She got upset, announced that "I'm going to screw you," and stormed out of the apartment.

On direct examination of S____ the prosecutor had asked her whether she had ever had anal sex with anyone besides Sandoval, and she had answered "No." She had also testified that she had not dates since the rape. On cross-examination, defense counsel, after reminding S____ of her denial that she had ever had anal sex with anyone besides Sandoval, said, "Now, you know a fellow named ..."- at which point the prosecutor interrupted with an objection. Out of the hearing of the jury, the defendant's lawyer explained that he had a witness sitting in the hallway who would impeach S____ 's testimony by testifying that he had had anal sex with her, that she had enjoyed it, and that he had seen her shortly before the trial "hanging all over a

gentleman friend of hers" at a bar. The judge refused to allow the witness to testify but did instruct the jury, just before the closing arguments, that it was to disregard the testimony that S____ had not had anal intercourse with anyone besides Sandoval.

The evidence was excluded on the authority of Illinois' rape shield law, on which see the useful discussion in Comment, "Toward a Consistent Recognition of the Forbidden Inference: The Illinois Rape Shield Statute," 83 *J. Crim. L. & Criminology 395* (1992). The law is understood to forbid the introduction in a rape case of evidence concerning the victim's sexual activities with persons other than the defendant. True, this is not quite what the law says. It says that in prosecutions for rape (called "criminal sexual assault" in Illinois) and related offenses, "the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused." Ill. Rev. Stat. ch. 38 ¶115-7(a). Evidence of sexual activity with other people besides the accused could often be described as

evidence *concerning*-bearing on, related to-the past sexual conduct of the alleged victim with the accused. But that is not how the statute is interpreted. As explained in the decision of the Supreme Court of Illinois affirming Sandoval's conviction, the statute limits evidence of the victim's sexual activity to her activity with the defendant, period. *People v. Sandoval,* 135 Ill. 159, 176, 552 N.E.2d 716, 734 (1990) (reversing the decision of the Illinois Appellate Court, which had reversed Sandoval's conviction). The interpretation of the statute by Illinois' highest court binds us, and establishes that the prosecutor violated state law when he asked S____ about her history of anal intercourse with persons other than the defendant and that the defense lawyer violated state law when he tried to cross-examined her about it. The prosecutor is not authorized to waive the protections of the rape shield law-for they are protections as much for the rape victim as for the prosecution of rape cases-and if he does so this does not open the door to defense counsel to disregard the rape shield law in his cross-examination of the victim. *Id.* at

180, 552 N.E.2d at 731.

But Illinois cannot, through a rape shield law or anything else, deprive a criminal defendant of his federal constitutional right to confront the witnesses against him, a right that has been held to imply the further right, though not one of unlimited extent, to cross-examine the prosecutor's witnesses. *Davis v. Alaska*, 415 U.S. 308, 315-18 (1974); *Stephens v. Miller*, No. 91-1690, slip op. at 7 (7th Cir. March 26, 1993). In this as in most rape cases, the key witness, and only eyewitness (apart from the alleged rapist), was the victim of the alleged rape; and the essential part of her testimony-that she was forced against her will to submit to sexual intercourse with the defendant-was not directly corroborated, although there was some corroboration, as we shall see. The principle of the rape shield law, designed as it is to exclude evidence that even if relevant has little probative value but great capacity to embarrass and distract, evidence that is considered to shift the balance of proof too far in favor of the rape defendant, has been held to be

constitutional. *Michigan v. Lucas*, 11 S. Ct. 1743 (1991). But the constitutionality of such a law as *applied to preclude particular exculpatory evidence* remains subject to examination on a case by case basis. *Stephens v. Miller, supra*, slip op. at 7-8; *Moore v. Duckworth*, 687 F.2d 1063, 1065 (7th Cir. 1982); *United States v. Begay*, 937 F.2d 515, 524 (10th Cir. 1991).

Sandoval argues that once S____ testified that she had never had anal intercourse with anyone besides Sandoval, and by so testifying buttressed her testimony that she had not consented to have anal intercourse with him on the night in question, defense counsel was entitled to impeach her testimony by asking her whether she had had consensual anal intercourse with X____, and if she denied that she had, to call X____ to the stand and elicit testimony to the contrary from him. This line of inquiry would clearly have been precluded by the rape-shield statute, constitutionally applied, had she not testified about her history of anal intercourse. The essential insight behind the rape shield statute is that in an age of post-

Victorian sexual practice in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she *consented* to engage in this activity with the defendant on the occasion on which she claims that she was raped. And allowing defense counsel to spread the details of a woman's sex life on the public record not only causes embarrassment to the woman but by doing so makes it less likely that victims of rape will press charges.

We must consider what difference it made that S____ testified about her other sexual activities (or abstentions). If that testimony was irrelevant, the defense would not, under standard principles of evidence, have been permitted-and certainly would not have had a constitutional right-to impeach the testimony with extrinsic evidence (that is, testimony by X____). *Taylor v. National Railroad Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir. 1990). But her testimony might have been thought relevant on the theory that it was calculated or at least likely to

strengthen the prosecution's case by reducing the likelihood that she had consented to anal intercourse with Sandoval on the occasion in question. If so, the defense would have a stronger case for being permitted to rebut the testimony, if necessary by extrinsic evidence, lest the jury be left with a misleading impression. As we have emphasized, a rape shield statute cannot constitutionally be employed to deny the defendant an opportunity to introduce vial evidence and impeaching evidence can be vital, J. Alexander Tanford & Anthony J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment," 128 *U. Pa. L. Rev.* 544, 581-83 (1980), though whether or when impeachment by *extrinsic evidence* is constitutionally guaranteed is fortunately an issue we need not resolve. Compare *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975), with *id.* at 564 (dissenting opinion).

For if there was error of constitutional magnitude in excluding the particular evidence (which we do not decide), it was cured, or more precisely rendered harmless beyond reasonable doubt, by the

judge's instruction. Cf. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). We are well aware of the limited efficacy of most curative instructions-but not this one. When the judge instructed the jury to disregard S____'s *denial* of having engaged in anal intercourse with other men besides the defendant, the natural inference for the jury to draw-which is just the inference that the defendant would have wanted it to draw-was that she *had had* anal intercourse with other men. So the exclusion of the evidence that the defense wanted to offer did not harm the defense and therefore cannot be a ground for invalidating Sandoval's conviction. In this respect the case is like *Moore v. Duckworth, supra.* The victim of the alleged rape in that case was pregnant at the time she testified at trial. The defendant wanted to present evidence that she was pregnant by her boyfriend, not by him. The judge held that the evidence was inadmissible under the rape shield statute. We thought this an absurd interpretation of Indiana's rape shield law, but bowed to it because it was the interpretation of the state's highest

court. But we added that "the absurdity of the Rape Shield Law cannot be overlooked if it denied [the defendant] a fair trial." 687 F.2d at 1065. However, as the trial judge had employed strenuous and apparently successful efforts to prevent the jury from discovering that the rape victim was pregnant, we concluded that Moore had not been unfairly harmed by the application of the rape shield law, and therefore could not obtain relief under the Constitution.

The next issue concerns the judge's refusal to permit testimony about S___'s "hanging all over a gentleman friend." The testimony was not excluded on the authority of the rape shield statute, presumably because it was not testimony about sexual activity-though that depends on how the term, which the Illinois rape shield law uses without defining, is interpreted. Comment, "*Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*", 1985 *Wis. L. Rev.* 1219, 1227-28 and n.35. Also, the alleged incident of S____'s "hanging all over a gentleman friend" did not occur prior to the alleged rape, but "prior" or "past" in

rape shield laws is usually interpreted as prior to trial, rather than prior to the alleged rape. See *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991), construing the federal rape shield provision, Fed. R. Evid. 412.

The evidence was not, however, such vital impeachment that its exclusion can be said to have deprived Sandoval of his constitutional rights. For the evidence of his guilt was very powerful despite the lack of direct corroboration for S___'s central testimony. Realistically, a jury called upon to decide guilt must compare the prosecutions's version of the incident giving rise to the case with the defense version. *Spitz v. Commissioner*, 954 F.2d 1382, 1384-85 (7th Cir. 1992). The defense version asked the jury to believe that S____, after an extensive bout of sexual intercourse initiated by her and only reluctantly consented to by the pacific defendant, flew into a rage, bruised herself, ran half-naked into the hallway, and successfully impersonated a rape victim to a neighbor and two policemen. Anything is possible, but this is distinctly unlikely and its plausibility would not have been decisively enhanced

had it been established that S____ had exaggerated the effect of the rape when she testified that she hadn't dated since the rape.

The last issue concerning the rape shield law brings us back to the mysterious Mr. X____. An important part of S____'s testimony, it will be recalled, was that she disliked anal intercourse, found it painful, and begged Sandoval not to force her to have intercourse that way, implying that she might have consented, however reluctantly, to vaginal intercourse. He on the other hand, as we have noted, testified that she liked anal intercourse and initiated it on this and other occasions. If it could be proved that she had had and enjoyed anal intercourse with another man, never complaining about any pain, this could be thought not merely to contradict her testimony on an arguably collateral point (having to do with her sexual relations with other men) with a view to persuading the jury to disbelieve her testimony on the vital points, but to undermine her testimony that she did not consent to have anal intercourse with Sandoval on the night of the alleged rape, because pain was one of

the reasons that she had offered for why she hadn't consented. The Supreme Court of Illinois in Sandoval's appeal held that the admission of X____'s evidence was barred by the rape shield law, 135 Ill.2d at 183, 552 N.E.2d at 736-37, but that law, as we have said, cannot be allowed to prevent a defendant from putting on a defense to what is after all a very serious charge. And consent is, of course, a defense to rape.

But we do not understand defense counsel to have wanted to put on his witness waiting in the hallway for the purpose of impeaching S____'s testimony that she did not consent to have anal intercourse with Sandoval. So far as appears, Sandoval's counsel would not have procured the witness had it not been for S____'s testimony about never having had anal intercourse with anyone else. He wanted the witness solely in order to contradict a body of testimony that the judge erased by his curative instruction. But if this is wrong and Sandoval wanted the witness also or instead in order to contradict S____'s testimony about consent, still we do not think its exclusion violated Sandoval's constitu-

tional rights. Sexual intercourse, whether vaginal or otherwise, is not uniformly pleasurable or painful. The fact that S____ had had pleasurable anal intercourse with another man on another occasion would not show that she would have enjoyed having it with Sandoval on an occasion when he was enraged with her and wanted by penetrating her anally to humiliate and, quite possibly, physically hurt her. Indeed, by that logic rape shield laws would be unconstitutional to the core because their central aim is to prevent the drawing of an inference of consent from previous consensual intercourse with other men. This case is a little more difficult because the victim's testimony was that she had found anal intercourse unpleasant *with Sandoval when they were living together*. This implies that she disliked the *practice*, an implication in tension with her having voluntarily engaged in it with another man-though of course we often consent to do things we don't much like or even actively dislike.

But this just brings us back to the impeachment of her testimony that she had never had anal intercourse with anyone

but Sandoval. The judge told the jury to disregard that testimony. The jury was left to ponder the implication that she *had had* anal intercourse with someone else. The jury surely realized that it undermined her contention that she found anal intercourse painful, and that by doing so it also undermined her testimony that she had not consented. Weighing all the facts and their implications, the jury convicted Sandoval. The thumb of the rape shield law was not on the balance; in effect, the judge's instruction took that law out of the case. We can see this by supposing that S____ had never testified about anal intercourse with other men. Then even without a rape shield law it is doubtful that testimony that she had enjoyed it with another man would be admissible, for it doesn't or at least shouldn't, require a rape shield law to show that consent to sex with X on one occasion is not good evidence of consent to sex with Y on another.

Finally and unrelatedly, Sandoval challenges his sentence as excessive. The challenge can get nowhere. It was not raised in the Illinois Supreme Court, 16 Charles Alan Wright, et al; *Federal Practice*

and Procedure § 4007 at p. 554 (19977); and in any event a 15-year sentence for rape not involving serious physical injury, while severe, can hardly be thought so savage a to violate the limits, if any, which the Constitution places on the severity of prison sentences. *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991). Sandoval challenges the following remarks by the sentencing judge: "I find it absolutely astounding that any human being would participate in this type of activity. Animals do not engage in this type of logic [?]. But animals react from instinct, and logically we are told that human beings are smarter than animals, because we have two matters that make us more superior. We can talk and we can reason and we are superior to animals. Sometimes I wonder." And Sandoval points out that in another case this judge was rebuked by his judicial superiors for remarking, in sentencing the defendant for homosexual child abuse, "I cannot think of a worse crime than an aggravated sexual abuse crime. I can tolerate a murderer. I can tolerate a robber. I can tolerate a burglar. But when it comes to

sex, you know, even an animal avoids fornication with an offspring from the same birth. You know, your act is very, very heinous. Your act is worse than that animal, at least the animal, by instinct, does different things, and a human being differs from an animal because we are supposed to know how to reason, how to think." Quoted in *People v. Zemke*, 159 Ill.App.3d 624, 628, 512 N.E.2d 374, 376 (1987). Although the accuracy, relevance, and tone of the judge's remarks in sentencing Sandoval can be questioned, Sandoval points to no principle of constitutional law that would authorize a federal court to invalidate an otherwise lawful and constitutionally proper sentence because it did not appear to be the product of informed, measured consideration. It is not suggested that the judge took the defendant's race, religion, or political opinions, or any other forbidden ground for punishment into account in determining sentence. Cf. *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *United States v. Neyens*, 831 F.2d 156, 159 (7th Cir. 1987).

The denial of habeas corpus is AFFIRMED.

A true Copy:

Teste:

(s/) _____
Clerk of the United States Court of Appeals for the Seventh Circuit